



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 430 394



**HARVARD LAW SCHOOL
LIBRARY**



**HARVARD LAW SCHOOL
LIBRARY**

VOL. 10—N. J. LAW REPORTS.
S. W. HALSTED.

10	1	10	102	10	230	10	311
27	491	14	7	15	131	49	279
38	278	20	561	10	231	10	323
41	435	22	551	26	121	21	177
		22	621	10	233	21	178
10	7	26	204	19	126	13e	429
20	506	31	327			42e	45
20	511			10	123	10	237
21	36	14	331	36	179	43e	310
26	372	15	19	10	241	10	328
35	571	16	459	16e	312	11	395
51	21	18	219			44	556
		18	288	10	242	10	333
12	264	21	466	14	154	11	74
23	271	36	138	15	89	16	530
34	406	48	421	18	276	3e	562
29e	558	50	364	25	234	29e	574
		45e	76				
10	35			10	245	10	337
22	51	10	128	11	94	14	349
10	39	24	93	12	370	24	675
21	400			15	143	28	204
		10	133	15	143	10	340
10	42	18e	207	15	377	11	328
20	559	10	142	20	270	15	374
20	562	15	125	20	330	16	141
14e	40	18	236	21	173	16	145
15e	80	23	203	28	482	17	348
28e	424	24	493	32	558	24	362
28e	428	32	283	43	408	24	364
		38	438	10	250	25	192
10	49	39	221	16	413	27	560
15	78	42	395	19	81	27	572
16e	503	49	630	27	564	27	587
10	55	10	145	27	568	27	604
21	439	28	128	27	589	27	615
24	538	31	371	27	608	46	462
26	140	45	51	33	71	7e	156
		48	506	10	257	10	348
38	183	10	150	14	503	20	409
39	223	38	494	24	136	10	350
51	482	10	153	25e	569	17	69
		41	117	10	259	42	414
10	60	10	156	49	279	10	351
21	228	35	129	10	276	21	80
49	536	3e	17	15	188		
		10	160	29	265		
10	61	10	161	10	279		
21	475	27	205	49	85		
38	227	10	161	10	286		
		10	163	13	250		
10	62	26	473	17	455		
15	125	30	369	22	230		
17	452	10	190	10	288		
		30	234	11	188		
10	65	10	192	12	181		
22	51	14	300	13	240		
36	17	10	193	18	252		
2e	136	10	193	10	293		
4e	561	16	503	13	323		
43e	175	27	182	43	651		
		1e	305	10	297		
10	74	4e	377	17	197		
24	277	42e	8	20	532		
4e	469	10	208	10	301		
		13	70	17	69		
10	83	18	265	42	414		
45	384	10	217	10	302		
		14e	395	15	458		
10	87	10	222	10	304		
23	356	15	418	14	453		
33	321	17	42	20	444		
43e	454	24	809	36	14		

Copyright, 1890, by Frank Shepard,
Chicago. (Patent applied for.)

157
Dec 8

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
JUDICATURE

State of New Jersey

WILLIAM WALSTED,
REPORTER.



VOLUME V.

PRINTED BY JOSEPH JUSTICE.

1829.

JUSTICES
OF THE
SUPREME COURT OF JUDICATURE
OF THE

State of New-Jersey,

A. D. 1828—9.

CHARLES EWING, CHIEF JUSTICE.
GABRIEL H. FORD, } ASSOCIATE JUSTICES.
GEORGE K. DRAKE, }

ATTORNEY-GENERAL,
SAMUEL L. SOUTHARD.

LAW REPORTER,
WILLIAM HALSTED.

CLERK OF SUPREME COURT,
ZACHARIAH ROSSELL.

A

Table of the Names

OF THE

CASES REPORTED

IN THE

FIFTH VOLUME.

[THE LETTER V. FOLLOWS THE NAME OF THE PLAINTIFF.]

A	Page.	C	Page.
Aber v. Clark, - - -	217	Chadwick, Rogers v. - -	59
Ackley v. Adms. of Elwell, -	304	Chandler's adms. Trustees of	
Ackerman's Ex'rs. v. Van Hous-		Mead v. - - -	49
ten, - - -	332	Chapman v. Ex'rs. of Holmes,	20
Andruss, Ex'r. of Andruss v.		Chester township of, State v.	292
Stewart, - - -	160	Clark, Aber v. - - -	217
Anonymous, - - -	60	Coleman, Hutchinson v. -	74
Alloways Greek Inhabitants of,		Conover, Scott v. - - -	61
v. String, - - -	326	Cook, Neal v. - - -	337
—, Swing v. - - -	58	Cornelius v. Ivins, - - -	56
Auten v. Bridgewater Mining		Coryell, Worley and Welsh v.	231
Co. - - -	237	—, Scudder v. - - -	340
		Coursen v. Sutton, - - -	133
B		Coxe v. Gulick, - - -	328
Bailey & Ward, Gulick v. -	87	Craven, Dancer v. - - -	255
Blair v. Snover, - - -	153		
Booraem et al. North Bruns-		D	
wick v. - - -	257	Dancer v. Craven, - - -	255
Boqua and Smith, Den v. -	192	Davison v. Gardner, - -	269
Bowen v. Mulford, - - -	230	— v. Schooley, - - -	145
Bridgewater Copper Mining Co.		Debow v. Colfax and Titus,	128
Den v. - - -	237	Den v. Emerson, - - -	279
Brinkerhoof v. Doremus, et. al.	119	— v. Boqua, - - -	192
Brower v. Emerson, - - -	279	— v. Bridgewater Co. -	237
Brown, Williamson v. - - -	296	— v. Vanness, - - -	102
Burhans v. Vanness, - - -	102	— v. Dimon, - - -	156
Burke and Clarke, Tomlin-		— v. Stillwell, - - -	60
son v. - - -	295	— v. Steelman, - - -	193
Butler v. M'Dermot, - - -	63	— v. Clark, - - -	217
— M'Dermot, v. - - -	158		

TABLE OF CASES.

vii

S		Page.			Page.
Salem Pleas, State v.	-	319	Tenbrook v. M'Colm,	-	333
Schenck v. Schenck,	-	274	Thompson, Martin v.	-	142
_____ v. _____,	-	276	Titus, Debow v.	-	128
Schooley, Davisson v.	-	145	Towship of Chester and Eves-	-	292
Sciples, Griffith v.	-	228	ham, State v.	-	
Scott v. Conover,	-	61	V		
Scudder, Worley & Welsh v.	-	231	Vandyke et al. v. Chandler,	-	49
_____ v. Coryell,	-	341	Vanguilder v. Stull,	-	233
Sheppard v. Sheppard,	-	250	Van Houten, Den v.	-	270
Sherron v. Wood,	-	7	_____, Ackerman v.	-	392
Snook v. Sutton,	-	133	Vanness, Den v.	-	102
_____, Ordinary v.	-	65	W		
Snover, Blair v.	-	153	Wallace, St Mary's Church v.	-	311
State v. Edsall,	-	190	Ward and Bailey, Gulick v.	-	87
_____ v. Guild,	-	163	West, Griffith v.	-	301
_____ v. Hutchinson,	-	242	_____ v. _____	-	350
_____ v. Prall,	-	161	Wood, Sherron v.	-	7
_____ v. M'Dermot,	-	63	Wood v. Malin,	-	208
_____ v. Salem Pleas,	-	319	Woodward Ex'r. v. Woodward,	-	1
_____ v. Zule,	-	348	Wooley, Jeffery v.	-	123
_____ v. Webster,	-	293	Worley and Welsh v. Scudder	-	
Stewart, Andruss v.	-	160	and Coryell,	-	231
Stevenson, Matter of	-	60	_____ v. _____,	-	340
Steelman, Green v.	-	193	_____ v. Glentworth,	-	241
Stillwell, _____	-	60	Williamson v. Brown,	-	296
String, Inhabitants of Alloways	-		Williamson v. Booraem,	-	351
Creek v.	-	326	Y		
Stout, Adm'r. of Young v.	-	302	Young's Adm'rs. v. Stout,	-	802
St. Mary's Church v. Wallace,	-	311	Z		
Stull, Vanguilder v.	-	233	Zule, State v.	-	348
Suydam, M'Coury v.	-	245			
T					
Taylor Ex'r. of Woodward v.	-				
Woodward,	-	1			

CASES
DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
State of New-Jersey,

AT MAY TERM 1828.-

SAMUEL C. TAYLOR and others, Executors of ABNER WOOD-
WARD, deceased, against HORACE N. WOODWARD.

ATTACHMENT.

10 1'
51e 423

1. The court out of which an attachment issues, has the power to allow time to the auditors to make their report, beyond the third term from the issuing of the attachment.

2. Though the language of the rule, referring back the report of auditors is, "that the report of the auditors be referred back to them; and that they have time until the first day of next term to make their report." Yet the limitation of time contained in the rule is in no wise of the essence of the authority of the auditors, nor does its lapse disrobe them of their character as auditors, or extinguish the power of the court over them and their report.

3. The *die datus* contained in the rule is, in legal contemplation, nothing more than a continuance and the acceptance of the report, after the time mentioned in the rule has expired; and the rendition of judgment, upon it, will be a sufficient warrant to the clerk to enter such continuance as the regularity of the record may require.

4. Though the auditors make report at the third term, yet if the report is referred back to them, they may properly include in it the demand of a creditor not exhibited to them until after the report had been referred back.

WALL for plaintiffs.

Wood for defendant.

CHIEF JUSTICE delivered the opinion of the Court.

In the term of February 1826, the sheriff made return to the writ of attachment in this case, that he had attached a legacy of \$4,000, bequeathed to the defendant by Abner Wood-

May 1828.

Taylor *et al.*
v.
Woodward.

ward, payable by Apollo Woodward, and charged on a farm devised to him. The auditors appointed to audit and adjust the demands of the plaintiffs and other applying creditors made, to the term of September 1826, being the third term, their report, whereby they reported the sums due to certain creditors, and found that there was nothing due from the defendant to the plaintiffs in attachment. At the same term the court for satisfactory reasons, the validity of which have not been since questioned, made a rule to the following effect: "that the report of the auditors be referred back to them; and that they have time until the first day of next term to make their report." At the term of November 1827, the auditors made their report, finding due to the plaintiffs in attachment \$864.57; finding, also, the sums due to the other creditors named in the former report; and finding \$68.16, due to Aaron Cole, a creditor not named in the former report, but who presented his claim, for audit, after the matter was sent back to them.

John De Camp, to whom the legacy attached, was assigned by Horace N. Woodward, by deed of assignment, bearing date on the 21st day of October 1826, has moved this court to set aside the report of the auditors, because if the court had authority in September 1826, to allow them farther time to make their report, yet it was not made within the time so allowed, nor until November term 1827. This motion has been argued by counsel on his part and for the plaintiffs, and now stands for our opinion.

In making and sustaining this motion, John De Camp appears in no other or more favorable light than the defendant in attachment. There is no legal efficacy in the assignment to weaken existing rights, or impair existing liens, or to protect the legacy when claimed by the assignee, from any charge to which it had been previously, in a lawful manner, subjected. The matters contained in the affidavits and exhibits laid before us, furnish very strong presumptive evidence, that De Camp, when he took the assignment, had actual knowledge of the pendency of the attachment. But we need not dwell on this point, for the very pendency of the suit on attachment, and it will be observed that the assignment was made between the terms of September and November 1826, is so far as respects the matter before

as constructive notice, sufficient to disrobe him of all pretension to the character or immunity of a *bona fide* purchaser without notice, and to subject him to all the legal consequences of actual notice. *Pendente lite nihil innovetur*. There is no principle better established says *Chancellor Kent, Murray v. Lylburn*, (2 Jno. C. R. 444) nor one founded on more indispensable necessity, than that the purchaser of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties to that suit, who are not to receive any prejudice from the alienation.

Further. In the term of November 1826, a rule of this court was obtained on the part and in the name of the defendant, requiring the plaintiffs to shew cause why the proceedings of the sheriff under the attachment, and his return thereto, should not be set aside, on the ground that the legacy was not attachable. The rule was argued by counsel at February term, and the decision of the court given at May term following. From this fact it follows, either that De Camp made use of the name of the defendant, after he had ceased to have any interest in the matter, or that the defendant retained an interest notwithstanding the assignment on the face of it absolute, unqualified and for the whole legacy.

In as much then as De Camp can avail himself of nothing to impugn the report, which might not be equally urged by the defendant, it seems unnecessary to examine or decide a question raised by the plaintiff's counsel, insisting that De Camp ought not to be at all heard in this matter.

The merits of the report, or in other words the indebtedness of the defendant to the plaintiff in attachment, cannot at this time be made the subject of examination. The only legal mode which, for this end, can be adopted by the defendant, or any person standing in his place, is by putting in special bail and dissolving the attachment. And indeed, from the documents laid before us, it would seem as if the enquiry could not avail much to the defendant or De Camp if the question were open. By an instrument of writing signed by the plaintiffs and defendant, and under their seals, it appears that on the 15th September 1826, they made a settlement of the disputes between them, and especially respecting a book account standing against the defendant, on a book left by his father the decedent; and the de-

May 1828.

Taylor et al.

v.
Woodward,

May 1828.

Taylor et al.

v.
Woodward.

fendant acknowledged that he was indebted to them \$800, which he engaged to pay on the first day of the ensuing November. On the same day he executed another instrument of writing, also, under seal, directed to Apollo Woodward, whereby he ordered him to pay out of the above mentioned legacy, to W. J. Emley, and Samuel C. Taylor, two of the Executors of Abner Woodward, deceased, the sum of \$800, and specially requests him to accept the order; and accordingly, on the same day, Apollo Woodward did accept the order, by an acceptance in writing, endorsed. On the 20th of October, the defendant caused to be served, on Apollo Woodward, a written notice not to pay the order, because he alleges the executors had failed to comply with the agreement for a settlement, although the only stipulation on their part, which it contains, is, that when the money is paid they shall give him a receipt in full of all accounts, except a small note of hand. Of these matters there can be little doubt that De Camp was fully apprised; the assignment, to him, bears date the day after the above mentioned notice. Both are in the same hand writing; and the person who served the latter is a subscribing witness to the former.

Some of the questions involved in the objection, now made to the report of the auditors, have been heretofore settled. The power of the court to refer back the report or to set it aside, if need be, to allow time to the auditors to make report beyond the third term from the issuing of the attachment, and the authority of the court to render judgment, after the third term, have been distinctly recognized. In *Cory v. Lewis*, an attachment was returned to the term of December 1819, of the Court of Common Pleas of the county of Morris. The defendant was called, and auditors appointed. At the ensuing March term, the court set aside the writ of attachment and all the proceedings thereon. A *certiorari* was brought by the plaintiff, and at May term 1820, this court reversed the judgment of the Court of Common Pleas, and directed the attachment to be continued, and the further proceedings necessary thereon to be had here. 2 South. 846. In *Berry v. Callet*, a report of auditors on attachment was made to the Court of Common Pleas of the county of Bergen, in January term 1822, whereby they found nothing due to certain of the applying creditors. At their instance a rule was taken to shew cause why the report should

not be set aside, and the claims of the rejected creditors be admitted; and at the same term the plaintiff moved for judgment, on the report, which the court denied. A writ of *mandamus*, to command the court to enter judgment, was applied for here. Upon the argument Chief Justice KIRKPATRICK, said he could scarcely entertain a doubt of the right of the court to open the report of the auditors, and mentioned a case before the revolution, in which the court had stayed the proceedings in attachment, and ordered an issue to try the claim of a creditor. After some time, for deliberation, the court held that the Common Pleas had a right to refer the matter back to the auditors, and overruled the application for a *mandamus*. In this conclusion, I am fully satisfied, from a review of the subject, the court were right. It is essential to the ends of justice, and the due administration of the law, that the power of the court, over the report, should be vindicated and maintained. The provision in the statute, for the entry of judgment, is designed to shew the earliest period at which it may be entered, but by no means to prevent it at a subsequent time, when the circumstances of the case, in the opinion of the court, may justify the delay.

The remaining ground of objection is, that the report was not made until after the expiration of the time mentioned in the rule of September 1826. It is obvious this ground of objection has nothing, of what are called merits, to recommend it. It presents no consideration of injustice. It is matter of mere form. The defendant could not legally be heard before the auditors. The lapse of time, therefore, did him no injustice. It is recollected, that on the argument, the counsel of De Camp said the defendant having seen the term of November pass, without any report made, might justly suppose the plaintiffs had abandoned the attachment, and return to his residence in Ohio. But he did not wait until that term, for he made the assignment in October. Nor did he suppose the attachment abandoned; for in November term, he moved to quash it, and his own motion was depending until the May term following. The *dies datus*, contained in the rule, is by no means a conditional delegation of power to the auditors, and is in legal contemplation nothing more than a continuance. The reference back to them is, in form as well as in fact, distinct from, and independent of the direction as to time. The limitation of time is in no wise of the essence of the au-

May 1828.

Taylor et al.
v.
Woodward.

May 1828.

Taylor et al.

v.
Woodward.

thority of the auditors; nor does its lapse, by any means, disrobe them of their character as auditors, or extinguish the power of the court over them and their report. The pendency of the attachment does not thereby cease, nor the appointment of the auditors terminate. A formal entry of the extension of the time, if such entry on our minutes be requisite, may be made under our order now. Our acceptance of the report, and rendition of judgment upon it, will be a sufficient warrant to the clerk to enter such continuances as the regularity of the record may require.

The claim of Aaron Cole, although not exhibited to the auditors until after the matter had been referred back to them, was nevertheless in due season, and properly included in their report. All creditors are, according to the statute, entitled to be heard who apply to the court, or to the auditors before they make their report. The report here intended is clearly that which may be accepted by the court, and made the foundation of their judgment. The report which the court shall set aside, or refuse to accept, or refer back to the auditors, is in effect no report; such a report cannot close the doors on creditors; they remain open until a legal, final, report is made.

It is not unfit here to be recollected, that the legislature, unwilling to trust the statute respecting attachments to the ordinary principles of construction, which certainly would have ensured to so useful a remedy the most favorable regard, have expressly enacted, "that this act shall be construed in all courts of judicature, in the most liberal manner, for the detection of fraud, the advancement of justice, and the benefit of creditors."

The motion to set aside the report is overruled.

May 1928.

WILLIAM SHERRON *against* JOHN S. WOOD.Sherron
v.
Wood.

1. Misconduct of an arbitrator cannot be pleaded, or set up, as a defence to an action of law upon an arbitration bond. The same rule prevails with respect to error or mistake of law, or fact in making an award which does not appear upon the face of it.

2. Matters extrinsic, and not appearing on the face of the award, cannot be pleaded in bar of an action brought upon the arbitration bond. Per FORD J.

3. This court has no summary power or equitable jurisdiction over an award, unless the submission be made a rule of court.

THIS was an action of debt on an arbitration bond. The plaintiff declared in common form for the penalty of the bond.

The defendant pleaded six different pleas—to the fourth and fifth of which the plaintiff has demurred.

First plea, no award, after oyer of bond and condition.

Second plea sets forth the award and alleges non performance by plaintiff.

Third plea, no notice of the making of the award.

Fourth plea, that the said William Sherron ought not to have or maintain his aforesaid action thereof against him, because he says that he the said John S. Wood, was by the said arbitrator, denied the privilege of hearing and examining witnesses relative to the said accounts; and that the said arbitrator heard the said William Sherron, and examined his witnesses *ex parte*, in the absence of the said John S. Wood; and without notice to him, the said John S. Wood, to be present and attend at such hearing and examination; and this the said John S. Wood is ready to verify.

Fifth plea, that the said William Sherron ought not to have or maintain his aforesaid action thereof against him, because he says that the said arbitrator in re-stating and settling the said accounts, and making the said award, committed great errors and mistakes in law and fact; and this he the said John S. Wood is ready to verify. Whereupon, he prays judgment, if the said William Sherron ought to have or maintain his aforesaid action thereof, against him, &c.

General demurrer to the fourth plea, with the following cause specially annexed, *viz.*

And the said William Sherron, according to the form of the statute in such case made and provided, states and shews to the

May 1828.

Sherron
v.
Wood.

court, here, the following cause of demurrer to the said fourth plea, that is to say : that the said John S. Wood has therein pleaded matter arising from supposed misconduct or neglect of the arbitrators, to avoid the award, which it is not competent to him to plead, the same not being matter of plea, particularly as the defendant has not imputed fraud to the arbitrator, or shown that he had any witnesses or proofs to produce before him ; nor has alledged that he did not know the time and place of meeting for the hearing of parties, and examination of witnesses, on the said arbitration.

General demurrer to the fifth plea, with the following causes specially annexed, *viz.*

And the said William Sherron, according to the form of the statute in such case made and provided, states and shews to the court, here, the following causes of demurrer to the said fifth plea, that is to say : that the said plea is double, for as much as the said defendant has therein pleaded two distinct and separate matters to wit : that the said arbitrator committed errors in law, and also, that he committed errors in fact ; that the said plea is uncertain, in that it contains neither time nor place ; that it alleges errors, generally in law and fact, by the said arbitrator, and does not specially set forth what those errors are ; that the said plea is incapable of trial, in as much as it contains neither matter of fact, which can be tried by a jury, nor matter of law, which can be determined by the court, nor matter of record ; because it contains matter of fact, improperly complicated with matter of law ; because it does not particularly set forth the points in which the said arbitrator committed error ; because it contains matter of law to be determined by the court, and matter of fact to be tried by a jury ; and also, that the said fifth plea is in other respects uncertain, informal, and insufficient.

Joinder in demurrer, by defendant.

Dayton, for plaintiff, in support of the demurrer argued :

1. The *fourth* plea states that the defendant was denied the privilege of hearing and examining witnesses, and that the arbitrator heard the plaintiff and examined his witnesses *ex parte* in the absence of defendant, and without notice to him to be present.

This plea is defective in substance.

1. The defendant can not set up as a defence, in an action,

brought on an arbitration bond, any extrinsic circumstances to destroy the award—as misconduct of the arbitrator, &c. May 1828.

This case is to be distinguished from references by rule of court and submissions under the statute.

Sherron
Wood.

Observing this distinction, the authorities are very uniform, and clearly establish the principle above laid down. 8 *East* 344. 1 *Day* 130. *Ib.* 153. 2 *Ves.* 315. 3 *Atk.* 644. 1 *Atk.* 64. 15 *East* 58. 3 *Atk.* 497 (530.) *Kyd on Aw.* 327. 2 *Wils. Rep.* 149. 1 *Saund. Rep.* 327 (2, 3.) 2 *Johns. Rep.* 62. 1 *Salk.* 73. 3 *Johns.* 367. 1 *Bac. Ab.* 239. 2 *Chit. on Plead.* 478. 1 *Strat. Rep.* 647. *Cald. on Aw.* 203.

Fourth plea does not even set out the award.

Such a defence contradicts the award in the present case.

The only relief, in case of misconduct of the arbitrators, is in equity.

Here the arbitrator is made a party, and if he be found in fault is obliged to pay the costs of the suit. The arbitrator may be corrupt and yet the parties innocent.

The case of *Harker v. Hough*, 2 *Halst. Rep.* 428, does not contradict this principle. The plea there stated, that the arbitrators refused to arbitrate upon a certain claim exhibited by one of the parties.

That case, then, was determined upon the ground, which to a certain extent is indisputable, that an award of parcel, only of the things submitted, is void.

This is a very different thing from refusing to hear the witnesses of one of the parties, in order to make up their award, which they may do, and yet award upon all the matters submitted.

A distinct line may be drawn between the two cases, in the one the matter set up is intrinsic and in the other extrinsic to the award; it is the latter which is excluded by the authorities cited.

The same remarks apply to the case of *Richards v. Drinker, et al.* 1 *Halst. Rep.* 307; and to all the cases cited by the defendant's counsel in that of *Harker v. Hough*.

The submission does not give the parties, but the arbitrator, the privilege of hearing and examining witnesses.

II. But allowing the general principle, as laid down, to be incorrect, this plea shows no misconduct on the part of the arbitrator.

1. He does not allege that he had any witnesses.

May 1828.

Sherron
v.
Wood.

2. If he had, there may have been legal objections to them. He does not allege fraud in the arbitrator.

3. Some agreement or admission of the parties, may have rendered it unnecessary to examine them.

4. The allegation in the plea is indefinite, and does not exclude the supposition that some witnesses were examined on the part of the defendant. If any of his witnesses were rejected, his assertion would be true. Some of them may have been properly refused.

5. The defendant had no right to hear and examine the witnesses; this was more properly the duty of the arbitrator himself. If it had been said that the arbitrator refused to hear or examine the witnesses, the objection would have been more plausible.

Two distinct matters are contained in the plea.

6. The arbitrator is not bound to give notice to the parties to be present at the hearing and examination of the witnesses. There is no authority requires it: 3 *Atk.* 497, (530.) At any rate this is only an equitable objection.

7. Besides the parties themselves may have agreed upon the time of hearing in the presence of the arbitrator, in which case notice would certainly not be necessary.

The defendant does not say that he did not know the time and place of hearing.

It is the duty of a party to set out his case fully in his pleading. If the allegations in this plea do not necessarily import misconduct, in the arbitrator, it will be taken not to exist.

III. The *fifth* plea states that the arbitrator committed errors in law and fact. This plea is defective both in form and substance.

1. In form:

1. It is double; it contains two distinct objections to the award, *viz.* errors in law and errors in fact. Every plea must be single. *Chit on Plead.* 511. *Bac. Ab. Pleas, R. 1. ent. 1, 2, 3. Yelv.* 13.

If issue were taken on this plea it would require two distinct answers, which is a sufficient test of its duplicity.

A double plea is bad, even though one of the matters be ill pleaded or immaterial. *Com. Dig. Plead. E. 2. ent. 12, 13.*

A plaintiff on assignment of errors, cannot assign errors in law and errors in fact together; for they are different things and require different trials. *Bac. Ab. Error, R. 2. ent. 1, 3, &c.*

2. This plea is also uncertain. Every plea must be certain. *May 1828.*
Chit. on Plead. 513.

Sherron
 Wood.

This plea states neither time nor place. Where time is immaterial it should be the same in the plea as in the declaration.
Chit. on Plead. 509.

In a plea, the time and place of every thing material and traversable ought to be alleged. *Com. Dig. Plead. C. 19. ent. 11.*

The plea ought to specify the errors in the award. *Com. Dig. Plead. E. 5. ent. 1, 4, 7, &c.* In the assignment of errors it is necessary to particularize the points in which error exists.

3. This plea is not triable. Every plea must be so pleaded as to be capable of trial. *Chit. on Plead. 519. Com. Dig. Plead. E. 34. ent. 1, 2, 3, 5.* This plea contains an admixture of law and fact. If issue were taken thereon, a jury could not determine whether the award contained errors in law, nor the court whether it contained errors in fact. No particular facts are alleged upon which issue could be taken.

IV. This plea is defective in substance. The award cannot be re-examined by a court or jury upon matters either of fact or law.

1. As to the law. If there be no cause of action at law, an arbitrator may award damages. 2 *Vent. 243.* 3 *N. Y. T. R. 166.* *Kyd on Aw. 185.*

Arbitrators are not confined within the rules of law or equity.
Chan. Talbot, Kyd on Aw. 356.

Although they cannot award a thing to be done which is against law. Yet an award will not be set aside on account of a mistake in the law. 9 *Johns. Rep. 212.* 14 *Johns. Rep. 105.* 1 *Salk. 73.*

Courts will not re-examine awards. 3 *Johns. Rep. 367.* *Saund. 327.*

Awards are more liberally considered than formerly. *Kyd on Aw. 228-9, 243. Burr. Rep. 277.*

As to the facts. If the award could be re-examined under this plea, upon the facts, it would be giving to the court and jury the power of a Court of Appeal from the determination of the arbitrator. But an arbitrator is a judge, from whose sentence, if agreeable to the submission, there is no appeal. *Kyd on Aw. 139.*

The argument and authorities adduced, upon the principle laid down with regard to the fourth plea, viz. that no extrinsic

May 1828.

Sherron
v.
Wood.

circumstances can be brought to avoid an award, apply also to this part of the case.

EWING, C. J. The questions in this case arise upon demurrers filed by the plaintiff to two of the defendant's pleas. The action is brought on an arbitration bond, under which the arbitrator has made an award in favor of the plaintiff. In the fourth plea, the defendant says, that "he was by the arbitrator denied the privilege of hearing and examining witnesses, relative to the accounts in controversy, and that the arbitrator heard the plaintiff and examined his witnesses, *ex parte*, in the absence of the defendant and without notice to him to be present and attend at such hearing and examination. In the fifth plea, he alleges that the arbitrator in restating and settling his accounts and making the award, committed great errors and mistakes in law and fact."

The demurrers to these pleas are well taken. Misconduct of an arbitrator cannot be pleaded or set up as a defence to an action at law upon an arbitration bond. The same rule prevails with respect to error or mistake of law or fact, in making an award which does not appear upon the face of it. How far these rules are the most judicious which might have been devised, and why an injured party should be compelled to seek relief in such cases, in a Court of Chancery, are not admissible topics of inquiry; we are not to speculate, perhaps very erroneously, in such matters; we are to carry into effect the rules as we find them established. *Periculosum est res novas et inusitatas inducere.*

In the case of *Veale v. Harner*, 1 Saund. 326, the action was in debt on a bond conditioned for the performance of an award. *Saunders*, who was the counsel for the defendant, and considered it a case of the greatest hardship on his client, compelled the plaintiff to discontinue his action by a very subtle plea, for which, as a trick in pleading, he was reprehended by the court, but did not plead or set up by way of defence "bad practice of the plaintiff with the arbitrators." Afterwards however, the defendant filed a bill on the equity side of the court of Exchequer, disclosing this bad practice and had relief against the award. Serjeant Williams in his note on this case, very justly says, "Hence it seems to follow, that to an action of debt on bond for not performing an award or to an action on the award itself, the defendant cannot plead collusion or other misconduct

May 1828.

Sherron
Wood.

of the arbitrators in avoidance of the award. For as such a plea would in the principal case, have been supported by the facts, it may be pronounced with absolute certainty, that so able a lawyer as *Saunders* is known to have been, would have stated the facts in a defence to the action and not had recourse to the unworthy trick, for which he was so justly censured, if the plea could have been supported in point of law. And there seems to be no case or doctrine where a plea of this sort has been held to be pleadable, or a precedent of such plea to be found in any of the books of entries." In *Wells v. Maccarmick*, 2 *Wils.* 146, which was an action of debt on an award, the court said there never was an instance where evidence of partiality and corruption in the arbitrators was permitted to be given; that a jury in a special verdict cannot find any matter of fact dehors the award; and by parity of reasoning nothing dehors the award, as partiality is, can be given to them in evidence; that in a trial at law this matter of partiality and corruption can never be got at; that there is no case where this matter has ever been pleaded, and that the remedy in this case is in equity, or by action at law, against the arbitrators, if they have been corrupt.

It may be proper here to mention, that in the chancery books are a multitude of cases in which awards have been relieved against by that court on the grounds of partiality, corruption and misconduct in the arbitrators. 2 *Vern.* 251. *Ibid* 157. 5 *Vez.* 70. 3 *Wen's* 362. 2 *Vern.* 514. 1 *Vez. jun.* 369.

In *Braddick v. Thompson*, 8 *East.* 344, to an action of debt on an arbitration bond, after oyer, the defendant pleaded that the arbitrators did not before making the award, appoint any time for hearing the defendant or his witnesses or proofs; that the award was made without hearing any witness or proofs on behalf of the defendant, and without giving him an opportunity of producing any witnesses, or of examining or observing on the plaintiff's witnesses and proofs; the plaintiff demurred. Upon the argument, the court suggested that this matter could not be pleaded in bar nor serve otherwise, than as ground on which to have applied to the equitable jurisdiction of the court, for the purpose of setting aside the award; the demurrers were sustained and judgment was given for the plaintiff. In *Chicot v. Laqueene*, 2 *Vez. sen.* 315, Lord Hardwicke said he knew no case of a defence at common law, in an action brought on an

May 1828.

Sherron
v.
Wood.

award by corruption. In *Swingford v. Burn*, 1 *Gow. 5, Dallas, C. J.* held in action on an award that the defendant had no right to unravel the accounts exhibited to the arbitrator and dispute the validity of his award. In *Neuland v. Douglas*, 2 *John. Rep. 62*, the court say : a Court of Chancery may correct a palpable mistake or miscalculation made by the arbitrators, or relieve against their partiality or corruption. But, there is no such remedy at law in a case of submission, not within the statute. In *Barlow v. Todd*, 3 *John. 368, Spencer, J.* delivering the opinion of the court said : it is now well established, that at law nothing dehors the award invalidating, it can be pleaded or given in evidence to the jury. The arbitrators are judges chosen by the parties themselves, and their awards are not examinable in a court of law, unless the condition is to be made a rule of court, and then only for corruption or gross partiality. Courts of law cannot listen to suggestions contradicting the award or impeaching the conduct of the arbitrators. In *Cortlandt v. Underhill*, 2 *John. Ch. Rep. 366, Chancellor Kent*, says : the courts of law have always been averse to grant any relief in these cases, and the injured party was obliged to resort to equity. In an action at law on an award, even the corruption or misconduct of the arbitrator is no defence. In *Mitchel v. Bush*, 7 *Cowen*, 187, it was held, that where a matter is submitted to arbitrators by the mere act of the parties without being made a rule of court, it is no ground of objection to their award in an action to enforce it, that it is against law. *Kyd*, in his treatise on awards, 226, says : when the submission is by the mere act of the parties, the defendant cannot make extrinsic circumstances a defence to an action on the award or submission bond. In this respect he says, the Roman law is somewhat different from ours ; for though it provides no direct method, by which the party against whom the award is made, can impeach the conduct of the arbitrators, yet by a rescript of *Antoninus* it is provided, that the enmity of the arbitrators to the defendant, may be set up as a defence against the plaintiff's action for the penalty expressed in the submission. With us, in such a case, the only relief is in equity, which often sets aside awards and gives that kind of relief that seems naturally to arise out of the circumstances, as by directing accounts or granting injunctions to stay all legal proceedings which had been pursued on the

foundation of the award being good. *Caldwell* says, the defendant cannot plead to an action on the submission bond, partiality or improper conduct of the arbitrator. *Cald. on arbit.* 203. 177. *Chitty* says: partiality or improper conduct in an arbitrator in making the award without hearing the defendant and his witnesses, cannot be pleaded at bar to an action on the bond conditioned for the performance of the award, but is only matter of application to the equitable jurisdiction of the court to set aside the award. 2 *Chitty* 477.

The case of *Harker v. Hough*, 2 *Halst.* 428, does not at all conflict with these cases and principles. There the arbitrators had refused to consider one of the matters submitted to them, and of which they had notice; and the court held that the award was anullity, and that the defendant had availed himself of it in a legal manner. It was in effect a plea of no award; for the arbitrators had not pursued their authority, and had not made the award contemplated in the submission. The same principle was pursued in the case of *Mitchell v. Stavely*, 16 *East* 58. It was held a good plea in bar to an action on a submission bond of all matters in difference, that there was a particular matter in difference at the time of making the bond, of which the arbitrators had notice, but had omitted to make any decision thereon. *Lord Ellenborough* said: the award, therefore, is not only not final, but there is no award at all respecting one of the matters in difference referred. It was a condition of the submission that they were to award upon all matters in difference between the parties. The ground on which these cases stand is, not that the award was bad for misbehaviour of the arbitrators, but there was actually no award within the terms of the submission. On the argument it was insisted by the counsel of the defendant, that a wider scope of pleading is admissible and even necessary here than in England, because there the courts *always* exercise jurisdiction over the award and bond; and that misconduct in the arbitrators may not be set up by way of plea, because the party aggrieved, may always apply to the equitable side or jurisdiction of the Court of King's Bench or Common Pleas. But the first and second sections of our statute respecting arbitration, *Rev. Laws*, 158, are copied without any variance, scarcely even a verbal one, from the *stat. 9 and 10th W. 3*: and the general jurisdiction of the courts

May 1828.

Sherron
v.
Wood.

May 1828.

Sherron
v.
Wood.

being the same, it follows that the same powers over the subject matter are common to this and to those courts ; any power may be exercised here which may be lawfully exerted there ; and it is an error to suppose that the English Courts of common law, always exercise jurisdiction over awards, or that a party may in all cases apply to them for relief ; for they never do, nor can, in a summary way, interfere with or set aside an award when the parties have not agreed that their submission to arbitration, should be made a rule of court. Where such agreement is wanting, no application can be made to what was called the equitable side or jurisdiction of the court. I am not aware that the question now before us has heretofore been directly decided in this court. In the year 1800, an action was brought here by Peter Hickman, administrator of Thomas Jean, deceased, against William Brick, administrator, *cum testamento annexo*, of Thomas Carney, deceased, upon an arbitration bond. No defence at law was made ; but Brick, filed a bill in the Court of Chancery, alleging mistakes of law and fact, and misbehaviour of the arbitrators, and praying that the award might be set aside, and for relief against the proceedings in this court upon the arbitration bond. *Chancellor Bloomfield*, upon the hearing, being of opinion that some of the grounds were not available and others not sustained, dismissed the bill ; the complainant appealed. The Court of Appeals reversed the Chancellor's decree, ordered the award to be set aside, and decreed a perpetual injunction against the proceedings at law to enforce the award. To this case the remarks of *Sergt. Wilson*, before alluded to, may with great propriety be renewed. The counsel of Brick, would not have imposed on their client, the expense and inconvenience of a resort to the Court of Chancery, if in their opinion they could have resisted the award, in the action at law. With learning equal to *Saunders*, they could not have overlooked, and would not have forgone an available defence, although unlike him they would not have stooped to a subterfuge even to wear the laurel of success. And the eminent and distinguished counsel on the other side, would not have failed if they had supposed such resistance legal, to have sought on that ground to have closed the doors of the Court of Chancery. This case has not, it is true, the weight of judicial decision. It demands, however, all the attention due to the justly respected opinions of the counsel who were concerned in it.

From this examination of the subject it clearly results, that the matters contained in the 4th and 5th pleas, are not available on the part of the defendant. To avoid misunderstanding, it may be proper here to observe, that this opinion extends no farther than the case before us, and nothing is intended to be said in respect to the powers of the court on the proper grounds, to exercise them over a submission made, or agreed to be made, a rule or a reference, properly so called, of a pending suit. Although not necessary to the condemnation of the plea, yet it ought not to pass unnoticed because fully discussed at the bar; that the 5th plea is liable to some of the objections assigned as special cause of demurrer. It is entirely too vague and general, and wants the point, precision and certainty, in which so much consist the beauty and essence and utility of special pleading.

May 1828.

Sherron
v.
Wood.

FORD J. To debt for the penalty of an arbitration bond, the defendant prayedoyer of the condition, and then pleaded six pleas. The plaintiff demurred specially to the 4th and 5th, which was as follows : 4th plea, *actio non*, because the said defendant was, by the said arbitrator, denied the privilege of hearing and examining witnesses relative to said accounts; and that the said arbitrator heard the said William Sherron, and examined his witnesses in part, in the absence of the defendant, and without notice to him to be present and attend at such hearing and examination, 5th plea, *actio non*, because the said arbitrator, in re-stating and settling the said accounts, and making the said award, committed great errors and mistakes in law and fact.

The first question is, whether extrinsic matters, not appearing on the face of the award, are pleadable in bar of the action. I apprehend the law concerning submissions and awards to be perfectly settled. By the common law, a submission to arbitration could not be made a rule of court, unless there was an action depending in court. In that case either party, not performing the award of the arbitrator, was in disobedience of a rule of court, and punishable for the contempt in a summary manner, by way of attachment. But a court, proceeding in this summary way, on motion, and without writ, always considers itself in the exercise of an *equitable jurisdiction*; and therefore if an award be obtained under their rule, illegal on the face of it, they will set it aside if complaint be made of it before the last day of the

May 1828.

Sherron
v.
Wood.

next term ensuing the award. They have a right to do so, because it is proceeding under one of their rules. But it is at the same time an equitable jurisdiction, and therefore they will listen to every ground of relief that may be shewn for cause in a court of equity. This equitable jurisdiction over awards made in pursuance of a rule of court, upon motion, in a summary way, either to set them aside for just cause, or to enforce them when regular, by attachment, became so easy, cheap, expeditious, and desirable, that the legislature saw fit to extend it to cases not otherwise within the *power of the courts*. For where no action was depending, there were no parties in court, nor any *cause* in which a rule could be entered. The statute of 9 J. 10 W. 3 c. 15, removed this difficulty by authorising the entry of a rule wherever the parties in their submission should *agree* to have it done; which provision is incorporated in our code. *R. L.* 158, *sec.* 1 and 2. Hence the equitable jurisdiction of the court over awards, *arises out of the rule*, and where the submission is not a rule of court, there is no jurisdiction. Thus in the case of *Lucas v. Wilson*, 2 Burr 701, Lord Mansfield says, the statute was made to put submissions to arbitration, where no cause was depending, on the same foot as those where there was a cause depending. That the statute is only declaratory of what the law is, in actions depending, that are submitted by rule of court. In *Brodwick v. Thompson*, 8 East 344, the court said they had an equitable jurisdiction wherever the submission is made a rule of court.

Now, in the present case, the court has no summary power or equitable jurisdiction over the award, because the submission is not by rule of court. It does not come before us on motion, either to set aside the award or to enforce it by attachment, but in the form of a special plea in bar, and we have no power over it, if the award be legal on the face of it. So it is laid down in *Kyd on awards*, 327. When the submission is by the *mere act of the parties*, then, in order to be relieved against the award, on account of any extrinsic circumstances, the defendant cannot make them a defence to the action, nor give in evidence any thing to impeach the conduct of the arbitrators; the award is a determination of judges chosen by the party himself, and nothing extrinsic to that judgment can be offered in evidence to overturn it. The only relief is in equity. In 1 Saund. 327, note 3,

May 1828.

Sherron
v.
Wood.

it is laid down, that the defendant cannot *plead* in avoidance of the award, collusion or misconduct of the arbitrators. There seems to be no *case* or *dictum*, where a plea of this sort has been held to be pleadable, nor is a precedent of such plea to be found in books of entries. In the case of *Wills v. Maccarmick*, 2 *Wils.* 148, the court says: there is no case where this matter hath been pleaded; the remedy is in equity. In *Newland v. Douglass*, 2 *Johns.* 62, the court says: a court of equity may relieve against the partiality or corruption of arbitrators, but there is no such remedy at law, unless the submission is by rule of court. The same was ruled again in 3 *Johns.* 212, *Cranston v. Kinney*; and 2 *Vez.* 315, Lord *Hardwick* said, he knew of no case at law where it had been done.

The court would be glad to relieve the party without sending him to a court of equity, if it had the power of doing so; but to assume that power against such a stream of decisions, without a solitary precedent to countenance it, would set afloat what has been established for years. If the parties wish to give this court jurisdiction over their awards, the law has provided an easy way for them to do it, by agreeing to make their submission a rule of court. But they cannot be compelled. The statute gives them an option not to do so, and we cannot take it away. It becomes unnecessary to inquire in the second place, whether these pleas are sufficient in point of form, there being no form in which the matters therein contained, can be offered in bar of the action on the award. Judgment therefore must be rendered for the plaintiff on each of the demurrers.

DRAKE, J. The action of the plaintiff is brought on an arbitration bond. The controverted questions arise upon demurrers filed to the fourth and fifth pleas. The *fourth* plea alleges, in bar of the action, that the defendant was, by the said arbitrator denied the privilege of hearing and examining witnesses relative to the matters submitted, and that the said arbitrator heard the said William Sherron, and examined his witnesses *ex parte*, in the absence of the defendant, and without notice to him, &c. If this be so, it is ground for relief by bill in equity; or, in cases where the submission has been made a rule of court, the award may be set aside on motion; but it cannot be set up as a defence to an action on the arbitration bond. The cases are uni-

May 1898.

Chapman
v.
Holmes.

form on this subject. 2 *Wilson* 149. 8 *East* 344, &c. The cases in 2 *Halsted* 430, and 16 *East* 58, where the arbitrators refused to consider of a part of the matters submitted to them, are decided upon the ground that the award is void, from the arbitrators never having taken upon themselves the burthen of the arbitrament, conformably to the submission.

The *fifth* plea alleges, in bar of the action, that the arbitrators committed great errors and mistakes in law and fact, without pointing out what errors or mistakes. It is justly objected to this plea, that it is too uncertain, that it is double, and that it is incapable of trial, embracing the peculiar subjects of attention for both court and jury See *Com. dig. title pleader, E 2, 5, and 34*. I am of opinion therefore, that upon both of the above pleas, judgment should be rendered in favor of the plaintiff.

Judgment for plaintiff.

WILLIAM CHAPMAN *against* THE EXECUTORS OF WILLIAM HOLMES, DECEASED.

A covenant that one is lawfully seized of land, when in truth he is not, is broken as soon as made; and such a covenant cannot be assigned, so as to enable the assignee to maintain an action for a breach that happened before his time.

So, also, a covenant that a grantor has good right to grant, sell, and convey land, when he has not such right, is broken as soon as made, and not assignable.

The rule is the same as to covenants against incumbrances, when there are incumbrances existing, at the time of sale.

If the vendor of lands in fee covenants, for himself and his heirs, that he will warrant and defend the land to the vendee, his heirs and assigns, an assignee of the vendee who is evicted, may maintain a personal action of covenant against the executors of the vendor; and it is not necessary to maintain the action, to aver that notice of the pendency of the suit, by which the plaintiff was evicted, was given to the defendant.

THIS was an action of covenant. The facts in the case are fully stated in the opinion of *Justice Ford*. The case came before the court on demurrer to the declaration. *A. O. Dayton* for the defendants, and in support of the demurrer, said: the declaration of the plaintiff, sets forth breaches of the following covenants, said to be contained in a deed for certain land from William Holmes, the testator, to one Charles Jones, viz:

1. Covenant of seisin. 2. Covenant of power to convey. 3. Covenant against incumbrances. 4. Covenant to warrant and defend.

May 8128.

Chapman
v
Holmes.

The plaintiff claims damages as assignee of the said Charles Jones. 1. By conveyance from the sheriff under a judgment and execution against Jones; and 2. By conveyance from Jones himself.

The case came up on demurrer to the declaration.

I. The *first* objection to the declaration is, that an action founded upon a breach of the covenant of seisin will not lie by an assignee.

This covenant if broken at all is broken as soon as made, and becomes a chose in action which is not assignable.

1. The covenant is broken as soon as made. *Vid. Dyer*, 303. *Co.* 9, 60. 1 *Penn. Rep.* 407. *Lot v. Thomas. Hob.* 12. *Shep. Touchst.* 170. 4 *Johns. Rep.* 72. *Cro. Jac.* 304. This appears very clearly from the language of the covenant.

2. The covenant after it is broken is a chose in action, not assignable. *Vid.* 3. *Leon.* 51. 2 *Vent.* 278. 4 *Craneh.* 421. *Bac. Ab. Coven.* 74, 2 (a.) *Cro. Eliz.* 863. *Com. Dig. Cov. B.* (3) *ent.* 32. *Do. B.* (1) *ent.* 3. 4 *Johns. Rep.* 72. 1 *Salk.* 199. 1 *Vent.* 175. 2 *Lev.* 26, s. c. 4 *Bos. & Pull.* 158.

In order that the assignee should take advantage of the covenant it must run with the land; but if this covenant were broken, then no land passed to the assignee, and of course no covenant which could only run with it.

II. The *second* objection is, that an action will not lie by an assignee, upon a breach of the covenant that the grantor has power to convey. This covenant is considered of the same import with that of seisin; of course the foregoing authorities and remarks are equally applicable. 4 *Cru. Dig.* 78. *Sugd. L. of Vend.* 373. 3 *Lev.* 46. This appears also from the words and nature of the covenant.

III. The *third* objection is, that an action will not lie by the plaintiff as assignee, upon the covenant against incumbrances as stated in the declaration.

This covenant, if broken at all, was like the two former, broken as soon as made. *Shep. Touchst.* 172.

It is not in fact a distinct covenant, but forms part of the covenant of power to convey. *Shep. Touchst.* 172.

May 1823.

Chapman

Holmes.

There is nothing to separate it from the latter; it forms part of the same sentence and the same clause.

The word "that," seems to have been intended to designate and separate the other covenants.

A much stronger case of construction. *2 Bos. & Pull*, 13; and there is a similar case in which the whole was construed to form one qualified covenant in the state of Pennsylvania. *2 Binn. Rep.* 99, 102.

This covenant, when separate, is generally expressed in future time: as, that the land shall be holden free of incumbrance. *Sugd. L. of Vend.* 373, and the precedents *passim*.

A covenant running with land is always expressed in future time. *2 Mass. Rep.* 457, *arg. ref. Shepp. Abridgs.* 455.

The same arguments and authorities therefore, which were adduced respecting the two former covenants, apply equally to this.

IV. The *fourth* objection is, that, taking this as a separate covenant against incumbrances, and as passing to the assignee, the breach of it is not well assigned.

It ought to be specially assigned; a general assignment negating the words of this covenant is bad. *2 Mass. Rep.* 437, 461. *Marston v. Hobbs. Cro. Jac.* 425. *Broking v. Cham.*

The rule as to assigning breaches is, that a breach assigned in the words of a covenant, where the words do not necessarily import a breach, is not good. *Vin. Ab. (Cov. A. a.) Com. Dig. Pleader, (C. 49) ent. 1. Cro. Eliz.* 914. *Chantflower v. Priestly. Cro. Eliz. Lanning v. Lebering's case.*

Another rule is, that a breach must be certain and express. *Com. Dig. Pleader, (C. 48) and ent. 1, 2, 4.*

The assignment of this breach violates both rules. It is as much in contradiction of the latter rule, as the cases mentioned in *Comyn*, it alleges incumbrances without specifying them.

It violates the former rule, because the covenant against incumbrances does not extend to all incumbrances, without exception. *Dyer* 328. *Hob.* 35. *Vaugh.* 121. *2 Mass. Rep.* 437. *Cro. Jac.* 425. *Do.* 315, 444. *Leigh v. Gotyer.*

It does not extend to things of common right. A remitter is no incumbrance. *Vin. Ab. Tit. Incumbrancer.*

The breach does not shew an injury to the plaintiff, it refers

to the time of making the indenture before he had any interest in the premises. *Com. Dig. Pleader, (C. 47) ent. 12.* May 1828.

He should have shewn that the incumbrance lasted until his time, and that he discharged it. *Vid. Preced. 3 Chit. 337. 2 Mod. ent. 122, ref. Skin. 397. 2 Bac. Ab. 87, ref. Salk. 196.*

Chapman
v.
Holmes.

Otherwise, if this be a covenant running with the land, the grantor might be subjected to pay damages to many successive assignees.

The first grantee may have discharged the incumbrance.

It may be contended that the statement of eviction, which follows the breach of covenant of warranty, is to be taken as part of the breach of the covenant against incumbrances.

This cannot be, because the breaches are as distinct as the covenants themselves; and this statement is annexed to, or forms part of the breach of the next covenant, and is in no manner united with the breach of the covenant against incumbrances.

If, however, it be taken as part of the breach of the last mentioned covenant, it shews clearly that the covenant was broken as soon as made, inasmuch as it shews that other persons had lawful title to the premises at the time of their pretended conveyance to Jones; and, of course, that the grantor had not power to convey free of incumbrance.

It shews, too, that no land was conveyed with which the covenant could run.

V. The *fifth* objection is, that an action of covenant will not lie upon a warranty on an eviction of a freehold.

The laws on this subject, when particularly examined, is very clear and unconfused.

This covenant of warranty, when applied to a freehold, has always had a peculiar and technical signification; its signification always has been, that if the covenantee was evicted from the freehold, the covenantor would give him lands of equal value in its stead.

It is in all respects a covenant real. Covenants real are of two kinds: 1. Where a man binds himself to pass a real thing; and 2. Where the covenant runs with the land: this is a covenant real in both senses of the term. *Co. Lit. sec. 733, p. t. 736, p.*

In order to understand distinctly, its meaning and effect, it is necessary to go back to its origin. This is found undoubtedly in feudal times.

May 1828.

Clapman
v.
Holmes.

Under the feudal system the lord, in return for the homage or fealty of the vassal, was bound to secure to him his feud: this was implied by the words used in granting it, viz. *dedi et concessi*, and was what is called warranty in law.

The oath of fealty was introduced on the continent with life estates; homage, when they became hereditary. 1 *Sull. L. Lec.* 140, 6-223.

By the feudal warranty the lord, if he had not lands to give, was bound to furnish a recompense in money. 1 *Sull. Law, Lec.* 228-151. *Co. Lit. sec.* 697, p. (1.)

But the feudal law never was introduced into England in its full extent, and in that country the lord was never bound to pay money. 1 *Sull. L. Lec.* 228.

It seems that after the introduction of the feudal law into England, every kind of homage, but nothing else, bound the lord to warranty in law; but afterwards it was confined to homage ancestrel. *Co. Lit. sec.* 697, p. (1.)

In other cases especially, after the stat. of *quia emptores*, when it became customary to alien feuds, warranty in law had a substitute in express warranty. *Sull. L. Lec.* 230. 2 *Blackst. Com.* 300.

This was rather more confined than warranty upon homage ancestrel: in the latter the heir was bound to the value of all his lands; in the former only of those received from the ancestor who created the warranty.

In other forms of alienation introduced since the statute of *quia emptores*, no warranty was ever implied, and in them express warranty was inserted in the place of it. 2 *Blackst. Com.* 300.

In all these cases and at all these different times, warranty, whether express or implied, was substantially the same thing, to wit. strictly a covenant, real, binding the covenantor and his heirs, in case of eviction, to give lands of equal value in recompense for those lost.

And it is still the same thing.

The definition of warranty may be found in *Shep. Touchst.* 181. *Co. Lit. sec.* 697.

The form, as anciently used, may be found in *Shep. Touchst.* 181. 2 *Blackst. Com. App.* 1.

Personal covenants, such as seisin, quiet enjoyment, &c.

which bind the personal estate and representatives, were in process of time, when personal property became larger, found to be more convenient, and have been generally substituted; but in many cases the old warranty has also been retained, and it is found in the very deed upon which the action is brought, in the ancient words and form and without material addition. 2 *Black. Com.* 340.

These covenants, or some of them at least, would be altogether superfluous, were warranty considered as in any respect a personal covenant.

Now, as formerly, the warrantor binds himself and his heirs only, and the word warranty, which constitutes the essence of the warranty, is still used. *Co. Lit. sec.* 733. n. [e.]

For an explanation of the language of a warranty, and particularly for the meaning of the word "defend" see *Co. Lit. sec.* 733 & n. [c.].

The only two modes of proceeding upon an ancient warranty, were *voucher* and *warrantia chartæ*, which were real actions, if we except rebutter. *Co. Lit. sec.* 697. *Shep. Touchst.* 182-3. 2 *Blackst. Com.* 300.

It is necessary in investigating this subject, always to bear in mind the distinction between a warranty of a freehold, and a covenant to warrant an estate for years.

In the latter case, it is in some sort a personal covenant, and damages may be recovered. *Hob.* 28. *Roll v. Osborn.*

A warranty, strictly understood, cannot be annexed to a lease for years; there must be a freehold estate to support it. *Shep. Touchst.* 186. *Co. Lit. sec.* 74, 1 p. [e.] *Com. Dig. Gan. E.*

An action of covenant would not lie upon the warranty on an eviction of the freehold. 2 *Bac. Ab.* 67. *Hob.* 4. *Yelverton* 139, same case. 1 *Keb.* 821. *Brownl.* 19. *Dyer* 338.

It is true, that where there is warranty of a freehold, and the tenant is evicted for years, he might have covenant; but this was because he could not proceed by voucher or *warrantia chartæ* and would otherwise be left without redress. *Com. Dig. Cov. A. 4.*

That covenant would not lie upon eviction of the freehold, appears also from all the cases cited respecting voucher, *warrantia chartæ* and rebutter, which evidently exclude any other remedy.

Such having been the law in ancient times, beyond all doubt, it must be so still, unless it has been altered.

But when or how has such alteration been made?

May 1828

Chapman
Holmes.

The common law on this subject has never been changed by statute, either in England or in New-Jersey.

The ancient form of proceeding by voucher and *warrantia chartæ* it is true, has become in a great measure obsolete; but does that circumstance alter the law or change the nature of a warranty?

Voucher has been long disused, except in common recoveries, and the last instance perhaps, of *warrantia chartæ* was in the time of *Jac. 1. Ballet v. Ballet*, *Godb. 151*, mentioned by *Kent C. J. 4 Johns. Rep. 22*.

The old modes of proceeding upon warranty have become obsolete, not because a new one has been enacted or adopted, but because warranties themselves have given place to other covenants, upon which personal actions can be brought.

Since voucher and *warrantia chartæ* have been disused, has covenant been brought upon a warranty, on eviction of a freehold in any one case in England? or is such a case to be found in the New-Jersey reports?

Warranties are not often to be found in modern English conveyances, and where they are, they are not declared on. *Case of Dudley v. Folliot. 3 T. R. 584. 2 Bos. & Pull. 13.*

The principle contended for is expressly laid down by *Judge Vanness*, and indirectly by *C. J. Kent. 4 Johns. Rep. 11, 21.*

VI. If the principle above contended for, be incorrect, still the covenant is not so set out in the declaration, that the present action can be sustained upon it.

The covenant, as stated in the declaration, extends no farther back than the time of drawing or filing the declaration, or at most, of commencing the action.

The terms "now" and "hereafter," signify time present and to come, dating from the period at which they were used; "shall" and "will" indicate time future to the same period; whereas the time of executing the indenture was then past.

This may appear more plainly, by substituting for "now" and "hereafter," terms of the same meaning, *viz.* "at the present time," and "after the present time," and by inserting the word hereafter, after the words shall and will.

If the warranty entered into, at some previous period, had been intended to take effect at a time present at the drawing of the declaration, and immediately subsequent, it would have been correctly expressed by the language here used.

The case is to be determined by the rules of grammar and the common signification of language.

May 1828.

Chapman
v.
Holmes.

The past tense should have been used. *Vid. 2 Chit. 196. n.(h.)*

The time referred to in this and in the other covenants, cannot be the same. Different tenses are used ; and different adverbs.

A cause of action is therefore not shewn, previous to this suit.

VII. Taking it for granted that a personal action will lie upon a warranty, the breach in this case is ill assigned.

The breach here stated is, that the grantor did not warrant and defend the grantee in the peaceable possession of the premises.

This is a breach of the covenant for quiet enjoyment, which goes to the possession. Warranty applies to the title.

This breach appears to have been drawn from the form laid down by *Chitty* in case of covenant for quiet enjoyment. 3 *Chit. 326.*

The breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it. 1 *Chit. 326.*

Breach must not be larger than covenant. 1 *Chit. 328. Com. Dig. Plead. C. 47.*

VIII. In order to shew, in the declaration, a liability on the part of the defendants on the covenant of warranty, it ought to have been averred that notice of the suits brought to recover the land was given to them, and that they were called upon to defend them.

This is implied in the very nature of the covenant of warranty.

However the mode of proceeding, upon a breach of this covenant, may have been changed, certainly the meaning of the terms used, must remain the same.

What then was the original meaning of the word warrant, which proved the essence of the warranty ?

It is a mere translation of the latin word *warrantizo*, which not being pure latin, was no doubt framed to signify the feudal warranty.

What then was the obligation imposed by the feudal warranty ?

May 1828.

Chapman
&
Holmes.

It was that the lord should successfully defend the title of the vassal, to his feud, when called upon.

Notice was required to be given. The lord must be vouched. *Co. Lit. sec. 697, p. 1. Vid. 4 Mass. T. R. 348.*

The word is said, by *Sullivan*, to be derived from war, because the mode of trial was then by combat. *Sull. L. Lec. 228.*

Warrant must not then be understood in its modern signification, as commonly used, but as a translation of, and conveying the same idea with the word *warrantizo*.

By the civil law too, as practised both at Rome and in France, it has always been necessary for the warrantee, as soon as disturbed, to give notice to the warrantor, and call upon him to defend the property. *Co. Lit. sec. 697, p. (1.)*

Reason and justice also demand that it should be so.

If the warrantor is bound to secure the title, he ought to know when it is invaded, and by whom; which knowledge must be supposed to belong to the tenant.

Were notice not necessary, a person who had made an unfortunate purchase, might by refusing to bring forward the title deeds, or by a negligent defence, suffer a third person to recover the land, in order that he might receive back the consideration money from the warrantor.

It would open a door for collusion and fraud.

William N. Jeffers, contra.

FORD, J. William Chapman declares, that William Holmes bargained and sold, in his life time, certain lands to one Charles Jones, his heirs and assigns, and covenanted for himself, his heirs, executors and administrators, that he was, at the time of making said deed, the true and lawful owner of the lands; that he had full power and lawful authority to convey the same in fee simple; freely and clearly exonerated and discharged from all encumbrances; and that he would, for *himself* and his *heirs*, forever warrant and defend the said lands unto the said Charles Jones, his *heirs* and *assigns*, against all persons lawfully claiming or to claim the same. William Chapman then shews, that Charles Jones bargained, sold and assigned the same lands to him, whereby he became *assignee* thereof; and as assignee, he assigns the following breaches; *First.* That William Holmes, was not the lawful owner of the land at the time he made the

said deed to Charles Jones; *Second.* That he had no lawful power or authority to convey the same in fee simple; *Third.* Nor to convey free of incumbrances; *Fourth.* And that he did not warrant or defend him, the assignee, in peaceable possession of said lands; and he shews that Anna and Robert Johnson had, at the time Holmes made the said deed, lawful right and title to the said lands, and by virtue thereof evicted him, the assignee, by due process of law, and against his will; by reason whereof, &c. To the declaration and breaches so assigned, the defendants put in a special demurrer, and it will be proper to consider them in their order.

May 1828.

Chapman

Holmes.

1. The covenant, that William Holmes is true and lawful owner, is in the *present tense*, and was broken; if he was not such, the moment he made the deed. It is so laid down in *Shep. Touch.* 170. "If one seized of land doth alien it, and covenant that he is lawfully seized, when in truth he is not, but some other hath an estate in it before, in this case the covenant is broken, as soon as it is made." In *Bradshaw's case*, 9 *Rep.* 60, the breach is laid on the *very day* of making the covenant. In *Lot v. Thomas, Pennington, J.* calls it a present act, and if the covenants hath not title, or if not seized, the covenant is broken as soon as made. See also 4 *Johns.* 72. It is undeniable that this covenant was broken, therefore, in the time of Charles Jones, and that he might have sued for these damages. The right to them was clearly vested in him. Now nothing is settled with greater clearness than that a right to sue for damages is not assignable. If it were so, a man might transfer his right to sue for damages in slander, trespass, or assault and battery. It is a *chose* or thing in action, the assignment of which was maintenance, and clearly prohibited at the common law. For this reason a bond could not be assigned, so that the assignee could have an action in his own name, without the all powerful aid of an act of the legislature. It is equally so in covenant. In *Bac. Ab. Covenant, E. 5.* note a, it is laid down thus, "An assignee cannot sue upon a breach of covenant that *happened before his time*!" In *Lewes v. Ridge, Cro. Eliz.* 863, the whole court resolved that the covenant being broken before the plaintiff's time, it was a *chose in action* that could not be transferred over, and judgment was given against him. It is so laid down in *Com. Dig. Covenant B, 3.* "So covenant does not lie for an assignee upon

May 1828.

Chapman
v.
Holmes.

a breach done *before his time*." These authorities, beside others, which if necessary, might be cited, shew that William Chapman the assignee cannot maintain an action for breaches that happened before his time.

The *Second* breach is also upon a covenant in the present tense, that he (Holmes) had good-right to the lands *at the time he made the deed*. If he had not, the covenant was broken, and he might have been sued on it the day it was made. The same is true of the *third* covenant, that there were no incumbrances on the land at the time he sold it; beside which there is a fatal objection to the *third* breach that no incumbrances are set out. *Com. Dig. Pleader C. 48, 49. Cro. Eliz. 914. 9 Mass. 433. Marston v. Hobbs.*

The *fourth* and last covenant is different in character from all the foregoing; it is, that William Holmes for *himself* and his *heirs*, will warrant and defend the land to Charles Jones, his heirs and assigns forever. It is one that must necessarily have continuance and run with the land, as it is to do something in *future*. An assignee in whose time it is broken, by eviction, may undoubtedly have the benefit of it. Indeed, the defendants do not deny but he may; but being the ancient warranty, they contend that he can have that benefit only in the ancient way, by *voucher, warrantia chartæ* or *rebutter*; that there is no other way; and that a personal action of covenant, like the present, will not lie upon it.

To support their position, they refer to *Co. Lit. sec. 697*, where Lord Coke says, "that *warrantia* is a covenant real annexed to lands and tenements, *whereby* a man and his heirs are bound to warrant the same, and either upon *voucher*, or judgment in a writ of *warrantia chartæ*. to yield other lands and tenements to the value of those that shall be evicted by a former title, or else may be used by way of *rebutter*." This passage shews that the remedies there mentioned might be had, but it by no means proves that an *action of covenant* would not likewise lie. We are likewise referred to section 734, as one in which he declares that there is a diversity between a *warrantia* that is a covenant real, which bindeth the party to yield *lands or tenements* in recompense, and a covenant annexed to the land which is to yield *but damages*." Now it is true, that *every* covenant real did not bind to yield *lands* in recompense, for some bound only to yield

May 1828.

Chapman.
v.
Holmes.

damages ; he does not say the former bound to yield lands *only*. We are referred also to *Bac. Ab. Covenant C.* where the author says, "It seems by the better opinion that upon the eviction of a freehold, no action of covenant will lie on a warranty, for the party might have had his *warrantia chartæ* or voucher." Now this shews that there were respectable opinions *both ways*. The defendant's counsel confidently asserts, that there is no case of eviction of freehold to be found in the English books, where an action of covenant has been sustained on a warranty. Suppose this assertion to be true, it may only prove that the tenant, in ancient times liked the ancient remedies *best*. And it is not in the least surprising that he did so. *Voucher*, gave him the invaluable power, when a writ was brought against him for the land, to *stay the suit* until his warrantor came in to defend it ; or if he failed and judgment passed against the tenant, he (the tenant) got judgment in the same suit to recover over lands of equal value against the warrantor. There was no trouble of a cross action. The judgments against him and the judgment in his favor were simultaneous. The same day that he lost one farm he got another as good, or the fair value of it. But the *warrantia chartæ* afforded still greater advantages. Instead of waiting till foreseen trouble arrived he might anticipate it, before eviction, by suing out this writ, which bound all the lands of the warrantor and his heirs, from the time it was sued out. *Shep. Touch.* 184. Now if the tenant always preferred the better remedy, can it be inferred that there was no poorer one at his option ? If, upon a judgment to recover other lands, it appeared that the warrantor had no other, it is not clear that the tenant, under the same judgment, could not recover the value in damages. The ulterior proceedings on a judgment, to recover over, are not at this day familiar. The tenant recovered land as good in quality and quantity, or failing in that, recovered in value. In *3 Bl. Com.* 300, the author, who is very accurate, says "that the tenant may bring a *warrantia chartæ* to compel him to assist him with a good plea or defence, or else to render (damages and) the value of the land." Since the ancient remedies became obsolete it is in vain to tell a tenant he can have them, for he cannot ; why therefore should he not recover the value in an action of covenant ? If he cannot ; and if the ancient remedies are now gone, how passing strange it will be that here is a solemn covenant,

May 1823.

Chapman
v.
Holmes.

right but no remedy ! The ancient clause of warranty does not contain, to be sure, the identical word "*covenant*;" but any form of words amounts to it which shews the parties concurrence to the performance of a future act. *Bac. Ab. Covenant A.* Lord Coke expressly calls *warrantie* a covenant. And wherever there exists one, the law has provided a remedy by action of covenant. *Bac. Ab. tit. Covenant.* In *Marston v. Hobbs*, 2 Mass. 433, Chief Justice Parsons says, "At common law, the tenant after he had lost his land, might bring a personal action of covenant, on the covenant to warrant and defend, and recover a satisfaction in damages." The theory and principles of law appear to me very fully to warrant this opinion. In modern conveyancing the covenant for quiet enjoyment may be as good; but still this is a covenant, and when broken, there is no reason why an action of covenant should not lie upon it.

But there is another objection, that though William Holmes is bound, to this warranty, himself and heirs, he did not bind his *executors* by name, and therefore the action does not lie against *them*. My answer to this is, that the covenantor bound *himself*, and the general rule is, that where *he* is bound by a covenant, his executors, though not named, shall be bound also. *Bac. Ab. Covenant E.* "If a man covenant for himself only, for quiet enjoyment, and doth not say in the covenant, his executors, administrators, &c. yet his executors and administrators are bound," *Shep. Touchst.* 178. *Doug.* 43. 3 *Com. Dig. Cov. C, 1.* Such is the general rule, and this case is not within any of the exceptions.

Another objection is, that no notice was given of the pendency of Johnson's suit; or if given it is not averred. Now I admit that a warrantor, without being vouched, could not become a party so as to defend by a plea in his own name; but *warrantia chartæ* would lie before suit, and therefore required no notice. So neither is it requisite in a covenant. If the eviction was on elder title, by judgment at law, it is plenary evidence; unless it was by fraud. *Hamilton v. the Ex'rs. of Cutts.* 4 Mass. 349. It is not necessary to maintain the action, though useful to rebut an allegation (if any should be made) that judgment against the tenant was obtained by his fraudulent connivance. But notice is no part of the cause of action. It would be as necessary in cove-

nant for quiet enjoyment, after an eviction by due course of law, as in this case ; yet it is never done. 3 *Chit.* 337.

May 1828.

Chapman
v
Holmes.

On the whole, an assignee cannot maintain an action on the first, second or third covenants in this case, upon breaches which happened before his time, and as to them the demurrer must be sustained ; but he may well have an action upon the general warranty, for an eviction in his own time, and upon that breach the plaintiff must have judgment.*

DRAKE, J. This is an action for breach of covenant. The covenants declared on are contained in a deed of conveyance from William Holmes, the defendant's testator, to one Charles Jones, his heirs and assigns. Jones conveyed to the plaintiff; who having since been evicted from the premises, now seeks redress upon the covenants contained in the original conveyance from Holmes. The executors deny the plaintiff's right, to recover against them, on any of those covenants.

The first is what is usually called the covenant of seisin; a covenant which is broken, if broken at all, as soon as made. *Shepherd's Touchstone* 170. *Pennington's Reports* 407. 2 *Johnson's Rep.* 1. 3 *Johnson* 63. 2 *Mass.* 465. It was broken, as between William Holmes the covenantor, and Charles Jones. An action could have been immediately maintained on it by Jones. But Jones assigns the land to Chapman the plaintiff. Does the right of action pass with the land? it has been repeatedly decided that it does not. It is contrary to the principle of the common law, which will not permit a chose in action to be assigned. 4 *John Rept.* 72. *Croke Eliz.* 863. *Penn. Repts.* 407.

The defendant's counsel cited, contra, 4 *Term Repts.* 76. That was an action of covenant for quiet enjoyment, brought by a lessee against the assignee of the land ; and it was decided that the assignee, and the heir of the lessor were liable on this cove-

* **NOTE.** In accordance with this opinion is the decision of the Supreme Court of the state of New-York, in the case of *Townsend v. Morris*, and *Vancourtlandt, Executors of Vancourtlandt*, 6 *Cowen's Rep.* 123, and it may be considered as settled in that state, that a warranty of lands in a deed in fee, is the subject of a personal action of covenant against the executors of the warrantor, and the grantee is not confined to his voucher or *warrantia charta*.

May 1828.

Chapman
v
Holmes.

nant, upon the eviction of the lessee. The case, in 5 *Coke* 17, is upon the same covenant, brought by the assignee of the lessee after eviction, against the lessor. Neither of these cases oppose those first cited; and the law seems to be well established, that no right of action on the covenant of seisin passes to the assignee of the land; and therefore the demurrer to this breach is well taken.

The next covenant is, that the said William Holmes and wife had power and authority to grant, sell, and convey the said land to the said Charles Jones, his heirs and assigns. This covenant is of the same import with the first, and the action on it is liable to the same objections. 4 *Cruise*, Ch. 5. But it is added that they had the right and power to sell the said lands, "free and clearly acquitted, exonerated, and discharged of and from all manner of other and former deeds, gifts, grants, &c. and all other incumbrances that might in any way mar, hurt, injure, or diminish the same in title or estate." This is treated, by the counsel of the plaintiff, as a distinct covenant against incumbrances. But it appears to me to be a part of the preceding covenant, limiting or restraining it, if it varies it at all. The covenant against incumbrances known to the English conveyancers, and referred to in the English books, looks to the future, and is usually annexed to the covenant for quiet enjoyment. See appendix to 2 *Vol. Bl. Comm.* And the English decisions respecting their covenant against incumbrances, cannot with any propriety be applied to the case before us.

The remaining covenant is that of warranty. It is said in *Bacon's Abridgement*, title *Covenant C.* to be the better opinion, that a personal action will not lie on this covenant upon an eviction of the freehold. The same idea is suggested by *Van Ness*, Justice, in 4 *Johnson*, p. 11. It is certainly not one of the covenants introduced into English conveyancing in lieu of the ancient warranty; and, in New-York, the English covenants appear to be adopted. In Massachusetts, covenants of this kind are used, and personal actions sustained upon them without objection. In New-Jersey, I believe it is almost universally in use; and considering that the ancient mode of proceeding on warranties is nearly obsolete in England, and never had existence in this state. We cannot for a moment suppose that such a covenant is now introduced with a view to those ancient remedies,

or that the grantee, should be confined to them, to obtain redress after eviction. The principal difficulty, on my mind, arose from the mode in which the covenant was introduced, and which might be considered to furnish ground for a peculiar construction. The preceding covenants expressly bind the grantor, his heirs, executors, and administrators, and this succeeds them, and begins with the words: "and lastly, the said William Holmes for himself and his heirs," &c. But it is a general rule that whenever a testator is bound by a covenant the executor shall be bound. *Croke Eliz. 553. 2 Wash. 153* There is nothing in the nature of this covenant to vary that general principle; and the intent to confine the obligation to the testator and his heirs, not appearing by any means certain, I am inclined upon the whole to say, that the action may be sustained against the executors on this covenant.

May 1828.

The Ordinary

v.
Lippincott.

Judgment for the plaintiff.

I. H. WILLIAMSON, ORDINARY, *against* JOSEPH LIPPINCOTT, and DAVID S. ENGLISH, EXECUTORS OF ALLEN SMITH, DECEASED.

If A. who is testamentary guardian of S. and T. dies, and B. administers to his estate, and erroneously supposing, that as administrator of A. he became also the guardian of S. and T. possesses himself of the goods, chattels, and effects belonging to S. and T. and does not account for them, and an action is thereupon brought against B. and his sureties on his administration bond; a neglect by B. to pay S. and T. the amount found due upon a settlement of his accounts with them, before the Orphans' Court, cannot be assigned as a breach of such bond.

THIS was an action of debt upon an administration bond. The defendant pleaded performance generally. The plaintiff replied, and set out several breaches, the only one necessary to be noticed was as follows: "and for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in such case made and provided, the said *Isaac H. Williamson, ordinary, &c.* as aforesaid, saith, that heretofore to wit, on the first day of March, in the year of our Lord one thousand eight hundred and twenty-two, at Salem, aforesaid, the said Joseph Wright made and exhibited to the surrogate of the said county, an account of his administration

May 1828. of the goods, chattels, and credits which had then come to his hands as administrator of the said Vining Hill, deceased, who was testamentary guardian of George Snitcher, Henry Snitcher, John Snitcher, Sarah Snitcher, Margaret Snitcher, and Isaac Snitcher, children of Henry Snitcher, deceased; and the said *Isaac H. Williamson, ordinary, &c.* as aforesaid, further saith, that afterwards to wit, at the term of September, in the year last, aforesaid, at Salem aforesaid, the said account after being corrected and amended, upon examination by the judges of the Orphans' Court of the said county, was by their decree allowed; and the said *Isaac H. Williamson, ordinary, &c.* as aforesaid, further saith, that the rest and residue of the said goods, chattels, and credits remaining upon the said account so made and exhibited, and examined, and allowed by the said judges of the Orphans' Court, amount to the sum of seven hundred and seventy-one dollars and eighty-eight cents, to wit, at Salem aforesaid, in the county aforesaid; and the said *Isaac H. Williamson, ordinary, &c.* as aforesaid, further avers, that the said Henry Snitcher, Isaac Snitcher, John Snitcher, George Snitcher, Thomas Paterson, and Sarah his wife (late Sarah Snitcher) and George Kirk, and Margaret his wife (late Margaret Snitcher) are the persons by law entitled to receive the said rest and residue of the said goods, chattels, and credits so remaining as aforesaid. Yet the said Joseph Wright, although often requested so to do, hath not yet paid or delivered the same or any part thereof to the said Henry Snitcher, Isaac Snitcher, John Snitcher, George Snitcher, Thomas Paterson, and Sarah his wife, and George Kirk, and Margaret his wife, or any of them, but hath therein wholly failed and made default; and the said rest and residue of the said goods, chattels, and credits, so remaining as aforesaid, are still wholly unpaid and undelivered to the said Henry Snitcher, Isaac Snitcher, John Snitcher, Thomas Paterson, and Sarah his wife, and George Kirk, and Margaret his wife, contrary to the form and effect, true intent, and meaning of the said condition of the said writing obligatory to wit, at Salem, aforesaid, in the county aforesaid; and this he the said *Isaac H. Williamson, ordinary, &c.* as aforesaid, is ready to verify, &c.

To this breach thus assigned the defendant demurred.

Wm. N. Jeffers, argued in support of the demurrer.

A. O. Dayton, for the plaintiff.

The CHIEF JUSTICE delivered the opinion of the court.

May 1828.

The Ordinary
Lippincott.

To one of the breaches of the condition of the writing obligatory in this cause, which is an action upon an administration bond, the defendants who are the executors of one of the sureties of the administrator, have demurred. The breach is in the following words :—" that heretofore to wit, on the 1st day of March A. D. 1822, at Salem, in the county of Salem aforesaid, the said Joseph Wright, made and exhibited to the Surrogate of the said county, an account of his administration of the goods, chattels and credits, which had then come to his hands as administrator of the said Vining Hill, deceased, who was testamentary guardian of George Snitcher, Henry S. John S. Sarah S. Margaret S. and Isaac S. children of Henry Snitcher, deceased. And the said *I. H. W. ordinary*, &c. farther saith that afterwards to wit, at the term of September, in the year last aforesaid, at Salem aforesaid, the said account after being corrected and amended, upon examination by the said judges of the Orphans' Court of the said county, was by their decree allowed. And the said *I. H. W. ordinary*, &c. farther saith that the rest and residue of the said goods, chattels and credits, remaining upon the said account, so made and exhibited and examined and allowed by the said judges of the said Orphans' Court, amount to the sum of \$771.88, to wit, at Salem aforesaid, in the county aforesaid. And the said *I. H. W. ordinary*, &c. further avers, that the said Henry Snitcher, Isaac S. John S. George S. Thomas Paterson and Sarah his wife, late Sarah S. and George Kirk and Margaret his wife, late Margaret S. are the persons entitled by law to receive the said rest and residue of the said goods, chattels and credits, so remaining as aforesaid. Yet the said Joseph Wright, although often requested so to do, hath not yet paid or delivered the same, or any part thereof to the said Henry Snitcher, &c. or any of them, but hath therein wholly failed, &c."

By the condition of the administration bond, the administrator is required well and truly to administer according to law, all the goods, chattels and credits of the deceased, which shall come into his hands, possession or knowledge, or into the hands or possession of any other person or persons for him ; and farther, to " make or cause to be made, a just and true account of his administration, within twelve calendar months from

May 1826. the date of the obligation, and all the rest and residue of the
The Ordinary said goods, chattels and credits, which shall be found remaining
v. upon the account of the said administration, the same being
Lippincott. first examined and allowed of by the judges of the Orphans' Court of the county or other competent authority, shall deliver and pay unto such person or persons respectively, as is, are or shall, by law be entitled to receive the same."

The question presented by the demurrer, whether the breach is well assigned, depends on the enquiry whether the account mentioned in the breach, the balance of which has not been paid over to the persons entitled to receive it is the same account which is meant and mentioned in the condition of the bond. Now the administration mentioned in the bond, is a general administration of the estate of the decedent, and the account intended is, of course, an account of that administration. But the account and administration mentioned in the breach, are of the goods, chattels and credits which had come to the hands of Joseph Wright, as administrator of Vining Hill, who was testamentary guardian of certain persons of the name of Snitcher. The goods, chattels, and credits, mentioned in the breach, are not the goods, chattels, and credits, of Vining Hill, but those of the Snitchers, to whom Hill had been guardian, which came into the hands of Wright. However just and proper then it may be that Wright should account to the Snitchers, for whatever of their goods, chattels and credits he may in any capacity have received, yet it is abundantly clear, that the account mentioned in the bond and in the breach are not the same, and the latter cannot therefore be within the scope of the bond.

Again, it is clear that for the goods, chattels and credits mentioned in the breach, neither the law nor the condition of the bond, ever intended to impose a responsibility on the sureties of the administrator. Hill was the testamentary guardian of George Snitcher and others. After his decease, Wright erroneously supposing, that as the administrator of Hill, he became also the guardian of the Snitchers, acted in their affairs, and their goods, chattels and credits came into his hands, of which the account mentioned in the breach was made, and from which the balance was due. According to the language of the breach it is his administration, the administration of Wright, not the administration of Hill, as guardian. The goods and chattels,

May 1828.

Dea
v.
Fox.

came not into the hands of Hill as guardian, but of Wright, after the decease of Hill. But it is certain that Wright had no authority to act as the guardian of the Snitchers. Nor could his mistake in thus acting in the slightest degree, enlarge the extent of his bond or increase the responsibility of his sureties. The liability to the sureties of Wright, as administrator for their property, which may have come into the hands of Hill, as their guardian in his life time, is not here brought into view. The goods and chattels in question never came into the hands of Hill, but after his decease, into the hands of Wright, under his unauthorised assumption of the powers of guardian. Such being the case, the administration bond does not reach them.

The breach is not well assigned. The demurrer should be sustained, and judgment on it should be rendered for the defendants.

DEN ex dem. LEWIS MASON against MARMADUKE SMITH AND JACOB FOX.

10	39
54	166

IN EJECTMENT.

M. devises as follows: "I give and devise the plantation, whereon I now live, to my son Aaron and his male heirs, lawfully issuing; and for want of such heirs, I give the same to my son Barnt, and his male heirs, lawfully issuing; and for want of such heirs, I give the same to my son John and his male heirs, lawfully issuing; and for want of such heirs, to return back, &c. On the death of the testator, Aaron entered and died seized without issue. Barnt, the second devisee, then entered and became seized, but died out of possession, leaving three sons and three daughters, of whom Lewis Mason was the eldest. By this devise, Lewis, under the operation of the statute *de donis*, takes an estate tail.

The statute of New-Jersey, of 13 June 1799, abolishing all English statutes, did not abolish estates tail. Per Ford Justice.

FORD, J. John Mason by will dated the 3d of May 1799, but not proved till the 5th of October following, devised as follows: "I give and devise the plantation whereon I now live to my son Aaron Mason and his male heirs, lawfully issuing;—and for want of such heirs, I give the same to my son Barnt Mason and his male heirs, lawfully issuing; and for want of such heirs, I give the same to my son John Mason, and his male

May 1828.

Den
v.
Fox.

heirs, lawfully issuing; and for want of such heirs, to return back," &c. On the death of the testator, Aaron, the first named devisee, entered, and died seized without any issue. Barnt Mason, the second devisee then entered and became seized, but died ultimately out of possession, and this action is brought by Lewis Mason his eldest son.

It is argued that the devise "*to Barnt Mason and his male heirs,*" did not create an *estate tail* under the statute *de donis* 13 Ed. 1. because that and all other English statutes had been publicly abolished by law on the 13th June 1799; which date, though after the making of the will, was nevertheless prior to the death of the testator; and from the ambulatory nature of wills they never take effect till death; at which time, in this case, there was in existence *no law* for upholding this kind of estate; as estates in tail were entirely by force of the statute *de donis*. Now that it is so, there can be no doubt, in England. But it must be remembered that we had a statute of our own passed in 1784. *Pat. 54, sec. 2*. That was in existence fifteen years before the abolition of the British statutes, and that remained in force more than twenty years afterward. This statute adopts the *great principle* of the statute *de donis*, and supplies its place, as far as the legislature wished that great principle to remain. Beside acting retrospectively, on estates prior to 1784, it was made to operate *prospectively*, also, by its very words: "on all such devises which shall hereafter be made in tail of any kind;" thus preserving a future power of making these known estates under the restrictions and limitations in the same act. It is an absurdity that a regulation for *future* estates, should be preserved for twenty years after the abolition, if no such future estates could be created. These estates could be as well made under our own act as under the statute of Edward; they both rested on the same great principle, that the will of the donor should be observed; and in abolishing the English statute there was no intent to abolish the estates likewise; the principle of them, being very valuable to a certain extent, and to that extent the legislature meant to support them. An entire abolition, leaving them to be estates *on condition* at the common law, would have enabled a devisee, the moment he had issue, to alienate in fee simple, squander the money, and impoverish not himself, only, but a helpless family, that were objects of the provision. To en-

able parents and others to prevent foreseen prodigality, arising from weakness of intellect, or evil propensities, the legislature, by the act of 1784, intended these estates should be preserved under the regulation therein mentioned. They allowed to the devisee an estate for life, but vested the fee simple in the first heir who should take by descent. This Lewis Mason was the first heir taking by descents, and, therefore, on these facts, is entitled to judgment.

May 1820

 Den
v.
Fox.

DRAKE, J. I am of opinion that the language used by the testator under the operation of the statute *de donis*, created a contingent remainder in male tail, in Barret Mason, which became vested by the death of Aaron Mason without issue; and Lewis Mason being the second devisee in tail, or the first who hath taken in the line of descent, or of entailment, is according to the case of *Den v. Fogg*, *Pennington's Reports* 819, seized of an estate in fee simple, in the premises.

In opposition to this, the counsel for the defendants says: that before the death of the testator, and before any estate was created by the said will, the Legislature of this state indirectly abolished estates in fee tail, by enacting that no statute of Great Britain should thereafter have any force in New-Jersey; and as we have no statute *de donis*, and the act of 1784, and the supplement of 1786, do not create or establish, but merely limit an estate, which existed through the operation of a British statute, no such estate can now exist. I am not aware that this point has been decided in our courts, nor do I conceive it necessary to decide it now. For if this be not an estate tail, it is, according to the admission of all parties, a conditional fee at the common law, and if so, what is to prevent the plaintiff's recovery? It is answered, that if it be a conditional fee, then upon the birth of issue, the condition was performed, and the estate became absolute, so far as to permit the tenant to alien. This is, no doubt true. But did he alien? there is no proof of this. The defendants are found in quiet possession; and, therefore, say their counsel, a conveyance to them is to be presumed. But no such presumption can be legally founded on that fact alone. The result is, that without determining whether this be an estate tail, I consider the plaintiff entitled to judgment.

Judgment for plaintiff.

May 1828.

DEN *ex dem.* ELIZA HARDENBERGH *against* JACOB R. HARDENBERGH.

Den

Hardenbergh.

10 42
56 208

If a deed made between A. party of the first part and C. and D. his wife, party of the second part, grants, bargains, and sells, unto the said party of the second part, his heirs and assigns, a piece of land; and C. dies, his wife D. him surviving, she will be entitled to the whole of the estate during her life.

A conveyance of lands to a man and his wife, made after their intermarriage, does not, strictly speaking, create them joint tenants, but creates an estate of a peculiar nature of which they are seized, not *per my et per tout* (as joint tenants would be) but solely and simply *per tout*.

The statute of N. J. (*Revised Laws*, 556,) which enacts "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy, and not an estate of tenancy in common;" does not apply to an estate granted to husband and wife.

THIS was an action of ejectment, brought for the recovery of lands in the county of Middlesex. The cause was noticed for trial at the June Circuit, A. D. 1827, when the parties by their attorneys agreed upon the following state of facts (which was returned with the postea,) viz. "William M'Knight, being seized and possessed of the premises in question, by deed of bargain and sale, duly acknowledged and recorded, bearing date on the 31st day of August 1822, made between William M'Knight and Nancy his wife of the first part, and James Hardenbergh and Eliza his wife of the second part." The words "and Eliza his wife," having been interlined after the deed was drawn, and before it was executed, "the party of the first part, granted, bargained, and sold unto the said party of the second part, his heirs and assigns, forever, a lot of land in the township of Amboy, being the premises in question. To have and to hold unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever." The said James Hardenbergh, went into the possession of the premises under this deed, and built a large house and made other improvements thereon, and continued in possession until his death. The said James Hardenbergh died without issue, the said Eliza his wife, the lessor of the plaintiff him surviving, and upon his death she remained in possession for six months. The said Jacob R. Hardenbergh, the father of the said James Hardenbergh, thereupon entered into possession, and at the time of the service of the ejectment was in possession, by his tenant, John Appleby.

The defendant confessed lease, entry, and ouster, (*prout lex postulat.*) May 1828.

And it was further agreed, that if upon the foregoing facts, the court should be of opinion in favour of the plaintiff, then judgment to be entered for the plaintiff, with six cents damages, and six cents costs; and if the court should be of opinion in favour of the defendant, then judgment shall be entered for the defendant, with costs of suit to be taxed. Either party to be at liberty to turn this case into a special verdict, and bring a writ of error within one term after the entry of judgment. Don
Hardenbergh.

The cause was submitted upon written arguments by

Wood, for the plaintiff; and

C. L. Hardenbergh, for defendants.

EWING, C. J. By deed of bargain and sale, bearing date on the 31st day of August 1822, and made "between William McKnight and Nancy his wife, of the county of Burlington, and state of New-Jersey, of the first part, and James Hardenbergh and Elizabeth his wife, of the township of South Amboy, county of Middlesex and state of New-Jersey, of the second part," the words, and Elizabeth his wife, having been interlined after the deed was drawn and before it was executed, "the party of the first part," granted, bargained and sold "unto the said party of the second part, his heirs and assigns, forever," a lot of land in the township of South-Amboy, being the premises in question, to have and to hold, "unto him the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of him the said party of the second part, his heirs and assigns forever." Under this conveyance, James Hardenbergh, went into possession of the premises, built an house and made other improvements, and continued in possession until his decease. He died without issue. His wife, the lessor of the plaintiff, and one of the grantees in the deed survived him, and continued in possession of the premises for six months after his decease, at which time the defendant who is the father of James Hardenbergh entered, and continued, by his tenant in possession, at the commencement of this action.

The lessor of the plaintiff, claims the whole premises under

May 1828. the above mentioned deed, and insists that she is entitled thereby to an estate in fee simple.

Den
v
Hardenbergh.

The counsel of the defendant, in the brief submitted to us, insists that the wife by force of the deed, "takes a joint estate with her husband for life, and then it goes over to his heirs in fee simple; a joint estate for life with remainder in fee to the husband" "a well known estate in the law;" and for example he refers to the 285th, 2 *Littleton*, which is in these words. "If lands be given to two and to the heirs of one of them, this is a good jointure and the one hath a freehold and the other a fee simple." To which *Littleton* adds, "if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for term of his life." And *Coke*, in his comment says, "they are joint tenants for life and the fee simple is one of them."

The counsel of the defendant farther insists, that "if the deed should be construed according to the claims of the plaintiff, still by force of our statute, *Rev. Laws* 556, the lessor of the plaintiff and her husband, were tenants in common."

It is manifestly, unnecessary for us in order to decide this cause, to enquire or determine whether the lessor of the plaintiff takes under the deed an estate for life, or an estate in fee simple, because if as the defendant insists, she took only an estate for life, and by virtue of our statute, as a tenant in common, the plaintiff, her life estate of one moiety subsisting, must be entitled in this action to judgment, to recover one moiety of the premises.

In as much, however, as the plaintiff demands the whole premises, although to ascertain the duration of the estate of the lessor is not essential, yet the operation and extent of the statute respecting joint tenants and tenants in common, must be examined, because thereon depends the question whether the plaintiff is to recover the entirety or only a moiety.

Properly to understand the statute and safely and truly to construe it, we must first distinctly comprehend the nature of the estate which passes to husband and wife by a grant made to them during coverture.

A conveyance of lands to a man and his wife, made after their intermarriage, creates and vests in them an estate of a very peculiar nature, resulting from that intimate union, by which as *Blackstone* says, "the very being or legal existence of the woman is suspended during the marriage, or at least is incor-

May 1828

Den

v.

Hardenbergh.

porated and consolidated into that of the husband." The estate correctly speaking, is not what is known in the law by the name joint tenancy. The husband and wife are not joint tenants. I am aware that sometimes, and by high authority too, but *currente calamo* and improperly, as will, I think, be presently seen, the estate has been thus denominated. In respect however, to the name only, not to the nature of the estate, is any diversity to be found. The latter has been viewed in the same light as far back as our books yield us the means of research. The very name joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. *Littleton, sec. 291, (665.)* Of an estate in joint tenancy, each of the owners has an undivided moiety or other proportional part of the whole premises, each a moiety, if there are only two owners, and if more than two, each his relative proportion. They take and hold by moieties or other proportional parts; in technical language, they are seized *per my et per tout*. Of husband and wife, both have not an undivided moiety but the entirety. They take and hold not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are, and each is seized of the whole. They are seized not *per my et per tout*, but solely and simply *per tout*. The same words of conveyance, which make two other persons joint tenants, will make as husband and wife tenants of the entirety. *Lit. sect. 665 2 Lev. 107. Ambler 649. Moor 210. 2 Bl. rep. 1214. 5 T. R. 564-8. Vezey 199. 5 Jon. Ch. Rep. 437. 2 Kent. com. 112.* In a grant by way of joint tenancy, to three persons, each takes one third part. In a grant to an husband and wife, and a third person, the husband and wife take one half, and the other person takes the other half; and if there be two other persons, the husband and wife take one third, and each of the others one third. *Lit. sect. 291.* In joint tenancy, either of the owners may at his pleasure, dispose of his share and convey it to a stranger, who will hold undivided, and in common with the other owner. Not so with husband and wife. Neither of them can separately or without the assent of the other, dispose of or convey away any part. It has even been held where the estate was granted to a man and his wife, and to the heirs of the body of the husband, that he could not during the life of the wife, dispose of the premises by

May 1828.

Den

Hardenbergh.

a common recovery, so as to destroy the entail; nor did his surviving his wife, give force or efficacy to the recovery. 3 Co. 5. Moor 210. 9 Co. 140. 2 Vern. 120. Prec. Ch. 1. 2 Bl. rep. 1214. Roper on husband and wife 51. A severance of a joint tenancy may be made and the estate thereby turned into a tenancy in common by any one of the joint owners at his will. Of the estate of husband and wife, there can be no severance. 3 Co. 5. 2 Bl. rep. 1213. It has been held that a fine or common recovery by the husband during the marriage will work a severance, if the estate was granted to him and her before marriage, but if granted after marriage no severance will thereby be wrought. Ambler 649. Joint tenants may make partition among them of their lands, after which each will hold in severalty. Of the estate of husband and wife, partition cannot be made. The treason of a husband does not destroy the estate of a wife. In an estate held in joint tenancy, the peculiar and distinguishing characteristic is the right of survivorship, whereby on the decease of one tenant, his companion becomes entitled to the whole estates. Between husband and wife the *jus accrescendi* does not exist. The surviving joint tenant takes something by way of accretion or addition to his interest, gains something he previously had not, the undivided moiety which belonged to the deceased. The survivor of husband and wife, has no increase of estate or interest by the decease, having before the entirety, being previously seized of the whole. The survivor, it is true, enjoys the whole, but not because any new or farther estate or interest becomes vested, but because of the original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected. In the remarks I have made, it will have been observed, that the estates granted to husband and wife during marriage, has been the subject of examination. If lands be granted to a man and woman and their heirs, and afterwards they marry, they remain, as they previously were, joint tenants, they have moiety between them, as they originally took by moieties they will continue to hold by moieties after the marriage, and the doctrine of alienation, severance, partition and of the *jus accrescendi* may apply. Co. Lit. 187, b. 2 Lev. 107. Ambler 649. And to this kind of estate, Bacon may allude in the passage cited by the defendant's counsel. 3 Bac. arb. tit. Joint tenants B. "Baron and feme may be joint tenants;" or more probably,

judging from the context, he means to lay down the doctrine that they may hold an estate in joint tenancy with another person ; for unless used in one of these senses, the clause is unsupported by the authority cited in the margin, and differs from the succeeding passages on the same page.

May 1828.
 Den
 Hardenbergh.

Having brought to our view, the nature of the estate of husband and wife, we may proceed to ascertain the applicability of the statute, respecting joint tenants and tenants in common to the case before us.

It is enacted " that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common." But we have seen that the deed of James Hardenbergh and wife, would not anterior to that statute, have created an estate in joint tenancy, that the estate created thereby would not have been considered or adjudged to be of that class. It follows then, that it is not of that nature on which the statute was designed to operate. But the counsel of the defendant, appeals very properly to the preamble and to the light which may be thence shed on the intention of the legislature. It is in these words : " Whereas, estates granted or devised to a plurality of persons without any restrictive, exclusive, or explanatory words, have heretofore been held in this state, to be estates in joint tenancy, therefore be it enacted." The very same class of cases here, as in the enacting clause, is plainly designated. Such as had been held to be estates in joint tenancy. Moreover, the preamble mentions estates granted to a plurality of persons. But husband and wife, in contemplation of law are one person, not a plurality. We shall be the more satisfied with this construction, if we recur to the causes which induced the legislature to enact this law. The hardship, surprise and unanticipated consequences of the doctrine of survivorship, can rarely if, indeed, ever be felt in the case of husband and wife.

This statute then, does not operate on the deed before us. It is subject to the principles of the common law ; and by them, the wife is entitled, the husband being dead, to the possession of the whole premises.

In the case of *Shaw v. Harsey*, 5 Mass. 521, the Supreme Court of Massachusetts, held that the statute of that state, did not

May 1848.

Dea

Hardenbergh.

extend to conveyances to husband and wife, a statute substantially like ours, with this difference indeed, that the words "conveyances and devises to two or more persons," are there actually contained in the enacting clause, as the counsel of the defendant proposed to read them in our statute for greater elucidation. In New-York, they have a similar statutory provision: and in the cases of *Jackson v. Stevens*, 16 John. 115, and *Jackson v. Cary*, *ibid* 305, the Supreme Court decided that it did not extend to the case of husband and wife, and because their estate was not a joint tenancy. It is true, as remarked by the defendant's counsel, their statute has no such preamble. But hence, I apprehend their cases are entitled to more, not less, consideration. The preamble makes the scope of our statute more clear. In the state of Virginia, a similar decision has been made in the case of *Thornton v. Thornton*, reported in 3d Randolph 179, although the words of the Virginia statute "of whatever kind the estates or thing, holden or possessed be," are much more favorable to such a construction as the counsel of the defendant has sought to establish for our statute.

Upon the whole, I am of opinion the plaintiff is entitled to recover the whole premises in controversy.

DRAKE, J. This case turns upon the construction of the deed, conveying the premises in question. It is made "between William M'Knight and Nancy his wife, of the first part; and James Hardenbergh and Eliza his wife, of the second part;" and grants, bargains, and sells "to the said party of the second part, *his* heirs and assigns," the lands and tenements in controversy.

The said James Hardenbergh, took possession of the premises, made expensive improvements, and died there without issue, leaving the said Eliza his wife, the lessor of the plaintiff, in possession, which she held about six months, when the defendant, Jacob R. Hardenbergh, took possession, and still holds the same by his tenant, John Appleby.

The grantees are "the party of the second part," (that is, James Hardenbergh and Eliza his wife,) "his heirs and assigns." The term *party*, embraces both grantees, and is used for that purpose with strict grammatical accuracy; and the word *his*, is as definite in its reference to only one of them. More formally

expressed, this grant would read, to the said James Hardenbergh and Eliza his wife, and to the heirs and assigns, of the said James Hardenbergh. In *Coke on Littleton*, Section 285, it is said, "if lands be given to two, and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple; and if he which hath the fee dieth, he which hath the freehold shall have the entirety, by survivor, for term of his life." See, also, 2 *Cruise* 510-11. But the grantees were husband and wife: "upon a purchase made by them both, each has the entirety, and they are seized *per tout* and not *per my*." This principle, cannot have any operation in this case, (upon the principles of the common law,) for with it, or without it, Eliza Hardenbergh, having survived her husband, would be entitled to a life estate in the whole premises.

May 1828.
Vandyke *et al.*
v.
Chandler.

The only remaining question is, how far the common law, as applicable to this case, is varied by the statute. *Revised Laws*, p. 556. Under the operation of which, the plaintiff's right of recovery, would be reduced to one half the premises. My doubts on this point have been removed, by the view of it taken, in the opinion of the *Chief Justice*, and I concur with him that the plaintiff is entitled to recover the whole premises.

JOHN VANDYKE, JOHN LEANEY, AND HENRY BLAND, TRUSTEES
OF MARGARET MEADE, *against* GEORGE CHANDLER, AND ED-
WARD CHANDLER, ADMINISTRATORS OF GEORGE CHANDLER,
DECEASED.

10 49
61 206

If a creditor of an insolvent estate, neglect to exhibit, under oath, his claim to the administrator of his deceased debtor, within the time prescribed by the rule of the Orphans' Court, for that purpose, he will not be allowed to come in for a ratable proportion of the estate of the deceased, in the hands of the administrator.

THIS cause came before the Court, upon the following state of facts:—George Chandler, the defendants' testator, having purchased of George H. Burr, a certain plantation, in order to secure the balance of the purchase money, amounting to eight thousand three hundred and fifty dollars, executed and delivered to the said George H. Burr, several bonds, bearing date the

May 1823. 13th day of May 1815 : Conditioned for the payment of the said balance of \$8,350, and executed a mortgage the same day on the said plantation, to secure the payment of the money due upon the said bonds.

Vandyke et al.
v.
Chandler.

On the 6th day of January 1821, the said George H. Burr, by deed of assignment, granted, conveyed and assigned the said bonds, mortgage and mortgaged premises to Richard W. Meade.

On the 2d day of December 1822, the said Richard W. Meade, assigned unto the said plaintiffs, the said bonds and indenture of mortgage and mortgaged premises.

The said George Chandler, the defendants' testator, died on or about the 1st day of September eighteen hundred and twenty-three, having first made and published his last will and testament, in due form to pass real estate, and thereby devised the said mortgaged premises to the said George Chandler and Edward Chandler, the defendants, subject to the said mortgages.

George Chandler, died in September 1823, and administration with the will annexed, was granted to the defendants. The plaintiffs having caused a suit in Chancery, to be instituted January term 1824, to foreclose the equity of redemption in the said mortgaged premises, against the said George Chandler and Edward Chandler, as administrators and heirs of George Chandler; such proceedings were had therein, that on the 24th day of May 1824, a decree was made, that there was due to the said plaintiffs on the said bonds and mortgages, the sum of nine thousand nine hundred and eighty-three dollars and seventy cents, besides costs.

On the 11th day of August 1824, the sheriff of the county of Burlington, made sale of the mortgaged premises, by virtue of the said decree, for the sum of nine thousand four hundred and seven dollars and seventy-five cents, at which day there was due to the plaintiffs for principal, interest and costs, on the said decree, the sum of ten thousand five hundred and six dollars and eighty-three cents, being one thousand and ninety-nine dollars and eight cents more than the amount of sales of the said mortgaged premises; to recover which balance the plaintiffs instituted the present suit against the defendants. On the 22d day of September 1823, the defendants proved the will of their testator, and took out letters of administration, *cum testamento annexo*. In the term of August, A. D. 1824, Edward Chandler,

one of the defendants, who solely acted in the administration of the estate of his testator, represented to the Orphans' Court of the county of Burlington, in writing, and under solemn affirmation, conformably to the provisions of the act entitled, "An act concerning the estates of persons who die insolvent, and that the personal and real estate of the said George Chandler, deceased, was insufficient to pay the debts of the said deceased, according to the best of his knowledge and belief, whereupon the said Court in the term of August aforesaid, did order and direct the administrators of the said George Chandler, deceased, to give notice in the usual manner, to the creditors of the estate of the said deceased, to exhibit under oath or affirmation, his, her and their claims and demands against the said estate, within six months from that time, that such notice was regularly given. That after the said limited time had expired, and at least two months prior to the term of May 1825, the said defendants did give notice according to law, that at the said term of May 1825, they would make report to the said Orphans' Court, of the several claims and demands which had been exhibited against the estate of the said deceased, under oath or affirmation, and did also give notice according to law, that they would exhibit their account to the said Orphans' Court for settlement, in the said term of May 1825.

At which term of May 1825, the said Edward Chandler acting administrator as aforesaid, did make report to the said Orphans' Court of the several claims and demands which had been exhibited against the estate of the said deceased, under oath or affirmation, and did also exhibit to the said Court at the same time under solemn affirmation, a true and just account of the moneys, goods, chattels, rights and credits of the decedent, which had come to his knowledge, hands or possession; and did further report to the Court on solemn affirmation, that no real estate of the said decedent within the state of New-Jersey, had come to his knowledge; and in August term 1825, a decree of the Orphans' Court was made, declaring the estate of the deceased insolvent, and directing a distribution of the balance of the estate remaining in the hands of the administrators, to be distributed among the creditors who had exhibited their demands.

That by the account of the defendants, as decreed by the

May 1825.

Vandyk, et al.

Chandler.

May 1828.
Vaudyke et al.
 v
 Chandler.

said Orphans' Court, they had received personal estate of the said deceased, to the amount of one thousand and twenty dollars and sixty-four cents; that they had paid in preferred debts, expenses and commissions to the amount of three hundred and one dollars and thirty-five cents, leaving a balance in their hands to be distributed among the creditors of the said deceased, to the amount of seven hundred and nineteen dollars and twenty-nine cents; that claims to the number of eighteen had been exhibited to the defendants under oath or affirmation, within the time limited by the rule of the said Orphans' Court, amounting in the aggregate to the sum of one thousand and eight dollars and eighty-eight cents.

That the claim of the plaintiffs was not exhibited to the defendants or either of them, under oath or affirmation, until August term 1825, six months after the time limited by the rule of the said Orphans' Court.

It is agreed by, and between the parties aforesaid, that if the Court should be of opinion, that upon the foregoing state of facts, the plaintiffs are entitled to a ratable proportion of the balance of seven hundred and nineteen dollars and twenty-nine cents, remaining in the hands of the said defendants, with the eighteen creditors, whose claims were rendered under oath or affirmation, within the time limited by the rule of the said Orphans' Court, that then judgment shall be so rendered against the defendants in favor of the plaintiffs; and that if the Court should be of opinion that the plaintiffs are not so entitled, that then judgment shall be rendered in favor of the plaintiffs, only for a ratable proportion of such other estate of deceased, as the plaintiffs shall discover, and as has not been inventoried and accounted for by the defendants.

Garret D. Wall, Att'y. of pl'ff.

Abr'm. Brown, Att'y. of def'ts.

EWING, C. J. The plaintiffs are mortgaged creditors of the deceased, George Chandler. After his death, they filed a bill in the Court of Chancery, and obtained a decree for the sale of the mortgaged premises. The sale did not raise sufficient money to satisfy the debt, and for the balance this action was instituted.

In August term 1824, a representation of the insolvency of

the estate was made to the Orphans' Court of the county of Burlington, agreeably to the act concerning the estates of persons who die insolvent. Six months were given by the order of the Court to creditors, to bring in their claims and demands. Within that period, a number were exhibited under oath or affirmation, and in the manner directed by the act. The prescribed course of proceeding was pursued. And in August 1825, the Court decreed the estate to be insolvent, and the account of the administration being settled, directed a distribution among the creditors who had exhibited their demands. The plaintiffs did not exhibit any claim or demand against the estate, to the administrators, within the limited period, nor until the term of August 1825.

May 1823.
Vandyke *et al.*
"Chandler.

The present suit was commenced after the decree of the Court; and the question presented to our consideration by the parties is, whether the plaintiffs are entitled to a ratable proportion of the balance of the estate remaining in the hands of the defendants, with those creditors whose claims were rendered under oath or affirmation, limited within the time by the rule of the Orphans' Court.

The provisions of the act of the legislature, *Rev. Laws 766*, seem in themselves and from irresistible consequences to resolve clearly and satisfactorily this question. A period of time is to be fixed by the Court, and the creditors are required within that time, to exhibit their claims and demands under oath to the executor or administrator. After the expiration of the time, he is to make report to the Court of the several claims and demands which have been so exhibited. And after the adjustment of the accounts, the proceeds of the personal and real estate, the preferred debts and expenses being first paid, are to be distributed "to the said several creditors." It will be seen that these provisions not only contemplate a distribution among the creditors, who shall have exhibited their accounts in the manner prescribed, and within the time limited, but that the execution of the act, and the administration of the estate upon the system of equality, wisely intended, are otherwise wholly impracticable.

The legislature, have taken care not to leave this question to construction or inference, however clear the one, or irresistible the other. In the 11th section it is enacted, that "if any creditor shall not exhibit his claim to the executor or administrator, as

May 1828. *aforesaid, within the time limited and prescribed by the said*
Vandyke et al. Court, such creditor shall be forever barred from prosecuting or
 v recovering his said demand, unless the estate shall prove suffi-
 Chandler. cient, after all debts exhibited and allowed are fully satisfied, or
 such creditor shall find some other estate not inventoried or ac-
 counted for by the executor or administrator, before distribution,
 in which case such creditor shall receive his ratable proportion
 out of the same.

By this section the exhibition of the claim, "as aforesaid" that is to say, under oath or affirmation, and within the time limited by the Court, is made a condition on which the title of the creditor to participate in the distribution is to depend; and without making such exhibition he is forever barred, from prosecuting and recovering his demand, unless in one or other of the events, which are particularly mentioned. Neither the fact of the decree in Chancery, which had been made prior to the representation of insolvency, nor the knowledge of the existence of the debt of the plaintiffs, which may be fairly presumed from that decree, to which the administrators were parties, as defendants, can furnish any support for the claim of the plaintiffs to share in the distribution. The legislature have thought fit to prescribe a condition, and he who would avail himself of the advantages of the law, must fulfil it. *Qui sentit commodum sentire debet et onus*. The legislature have sought to guard the estate against unfounded demands, by an appeal to the conscience of the creditor. The suit in Chancery, neither directly nor indirectly answers this appeal.

The plaintiffs are not entitled to a ratable proportion with the creditors, who have fulfilled the conditions of the act; and such being our opinion, judgment according to the agreement of the parties is "to be rendered in favor of the plaintiffs, only for the ratable proportion of such other estate of the deceased, as the plaintiffs shall discover, and as has not been inventoried and accounted for by the defendants."

JOHN PROBASCO *against* JOACHIM HARTOUGH.

May 1828.

CERTIORARI.

Probasco

v.
Hartough.

If a defendant, in a cause pending before a justice of the peace, and in which if he has a defence, is lead into a mistake with regard to the time to which the cause is adjourned, and the trial is had in his absence, and without his knowledge ; this court will reverse the judgment.

By the affidavits taken in this cause, under a rule of this court, it appeared, that on the 11th day of October, to which time the cause had been adjourned, on the application of Probasco, the defendant, below, the said "defendant, called at the office of the justice, for the purpose of applying for a further adjournment thereof. That the justice, was not in his office, but that William Letson, a partner in trade of said justice, was there ; and upon Probasco's enquiring for said justice, and informing the said Letson of his business, was told that Hartough, had sent a letter that morning, and solicited a further adjournment for a fortnight ; and as the parties both requested it, such further adjournment would of course be granted. And that said Letson, further told Probasco, that it was unnecessary for him to remain until the said justice came in, as he would notify the justice of the application." That in consequence of this information, Probasco went home, and at the expiration of said fortnight, came prepared with his witnesses to try the cause, when he was informed, for the first time, that judgment had been rendered against him. That he was totally uninformed of the day of the trial, of said cause. And that he had a just and legal defence to make on the merits of the action.

It further appeared, by the affidavit of Letson, that Joachim Hartough, the plaintiff below, sent a letter to the justice, in which he requested an adjournment of his suit against Probasco, for two weeks. But the cause was actually adjourned only for one week, and that Hartough appeared on the day of the trial, and insisted upon having the cause tried, and that it was tried in the absence of Probasco the defendant below.

Vroom, for the plaintiff, in certiorari, moved to reverse the judgment of the justice, because Probasco, was surprised and deceived as to the time of the trial, and had not an opportunity of being heard ; and cited 2 *Pen. Rep.* 630. 1 *South. Rep.* 268.

By the Court. The act of the legislature, relative to the

May 1828.

Cornelius
v.
Ivins.

trial of small causes, says, "that to prevent fraud and surprise, the justice may grant adjournment," and in this case we are inclined to think, he ought to have granted the adjournment for two weeks. This is not so strong a case as that of *Trueax v. Roberts*. 1 South. 288 : and we think the judgment ought to be reversed.

Judgment reversed.

GEORGE CORNELIUS against ANTHONY IVINS.

CERTIORARI.

An item in a plaintiff's state of demand, or copy of his account, charging defendant "to loading vessel at his wharf, at Cedar-Bush Landing," may be considered as a charge for wharfage, and not a trespass.

A general charge "to sundries as per day book," if it stood alone, would be objectionable, but if on the same date there is a credit given the defendant for the same amount, and in the same language, the judgment will not be reversed for the generality of the charge.

If on the debit side of the account, there is a general charge for sundries, making the plaintiff's demand exceed the sum of \$100 ; yet if on the credit side of the account there is a general credit given the defendant for the same sum in the same language, and if the same date which reduces the balance of plaintiff's demand under \$100, the justice has jurisdiction of the cause.

THIS was a *certiorari*, to the Court of Common Pleas of Monmouth, brought by Cornelius the defendant, and appellant below to reverse a judgment, rendered against him, on an appeal from a justices court.

Ryall, for the plaintiff, in *certiorari*, relied upon the following reasons for the reversal of the judgment :—*First*, because the state of demand, filed by the plaintiff below, exceeded the jurisdiction of the justice, and the credit therein given, was not such as is required by law. *Second*, because the state of demand is defective in this, that it comprises two different causes of action, to wit, debt and trespass.

In support of the first reason, he referred to the state of demand, whereby it appeared that the whole amount of the plaintiff's demand, was \$214.47 ; but in this sum was included, a charge under the date of June 20th 1825, of "sundries per day book, \$163.50, thereby reducing the balance due the plaintiff,

under the sum of \$100. This general credit, he contended, was insufficient to bring the cause within the jurisdiction of the justice. In support of the second reason, he referred to the two following items in the state of demand, viz. "To loading vessel at his wharf, at Cedar-Bush Landing," and to "sundries per day-book." The *first* items he contended was for a trespass, and the *second* for a book debt, and that they could not be joined in the same action.

Wall, contra.

CH. JUSTICE. If the charge of sundries, per day book, stood alone, it would be objectionable for its generality. But it appears, that there is a credit given the defendant for the same amount, in the same language, on the same date; and in as much as those two items taken together, clearly show that there is no demand on this score, and that the one is extinguished by the other, we think we ought not to reverse the judgment on this ground. As to the objection that debt and trespass, are joined together, we think that the charge for "loading vessel at Cedar-Bush Landing," is not a trespass, but merely for the use of the wharf or wharfage—Therefore

Let the judgment be affirmed.

WILLIAM ROBERTS *ads.* JOHN HOLSWORTH.

A *mandamus* will be issued to a *Court* only to direct the Court to proceed according to law, but not to direct them how to proceed.

HORNBLOWER, on the part of Roberts the defendant, moved for a *mandamus* to be directed to the Court of Common Pleas of Essex, to compel them either to proceed in the cause, or to discharge the defendant on common bail, and he founded his application upon the following affidavits, viz. "That said defendant was on the 29th of December, A. D. 1825, arrested and held to bail, without a judge's order, for \$500. That said cause (that is *Holsworth v. Roberts*) was noticed for trial before the Essex Pleas, in April term, 1827, and remained without further notice, until April term 1828, when this defendant moved the

May 1828.

Swing *et al.*Inhabitants of
Alloways
Creek.

Court by his counsel, to have the same brought to trial, which was denied him. That this defendant was surrendered, in discharge of special bail, on the 21st of September 1827, but no bail piece and committur thereon, was committed to the late of present sheriff of said. county; and defendant still remains in the common gaol of the county of Essex, by virtue of such said surrender." That in January term, A. D. 1828, this defendant, by his counsel, applied to the said Court of Common Pleas, to be discharged on common bail, or for a judgment of nonsuit on said circumstances; which was also denied him.

CH. JUSTICE. To officers, a writ of *mandamus* may go to direct them how to proceed, and what to do; but a *mandamus* to a Court, only, directs them to proceed according to law, and does not direct them *how* to proceed. The furthest we have ever gone in these cases of *mandamus*, is in appeals to the Common Pleas, from the judgment of a justice, where we have directed the Court of Common Pleas, to restore an appeal which had been dismissed. But this is in effect nothing more than ordering them to proceed, and not directing the manner in which they shall proceed.

Motion denied.

DAVID SWING AND OTHERS *against* THE INHABITANTS OF THE
UPPER ALLOWAYS CREEK, IN THE COUNTY OF SALEM.

A party cannot commence a second action in the same court, for the same cause of action, until the costs of the first action are paid—and the rule is the same as to all courts within the same jurisdiction.

Sims, on behalf of the defendants, applied for a rule, upon the plaintiffs, to stay proceedings in this cause, in this court, until the costs of a former suit, between the same parties for the same cause of action, tried in the Court of Common Pleas of the county of Salem, were paid.

Wall, objected to the application, because, he said, costs of the suit in the Salem Pleas had not been presented to plaintiffs for payment, or any execution issued against them.

Jeffers, replied, and read an affidavit, stating that the costs had been taxed and demanded; and also, a notice of this application, and service thereof.

May 1828.

Rogers

Chadwick.

CH. JUSTICE. Let the rule be granted. It appears that the costs have been taxed and demanded. It is a clear principle, that a party cannot commence a subsequent action in the same court, for the same cause of action, until the costs of the first action are paid; and the rule is the same as to all courts within the same jurisdiction.

GEORGE W ROGERS against TABER CHADWICK.

CERTIORARI.

A rule to take affidavits, does not expire at the next term after it is taken, but stands until the cause is argued.

WALL, offered to read affidavits taken under a rule entered in this cause at November term.

Ryall, objected to the reading of the affidavits, and stated, that at the November term last, he had taken a rule for affidavits, and examined witnesses; but that the opposite party took no depositions at that time, but just previous to this (May) term, gave notice of taking affidavits, and did take the depositions now offered. He apprehended that the rule for affidavits, taken in November, expired at the February term, and that the opposite party could take no affidavits subsequent to that term.

CH. JUSTICE. That is not the proper construction of the rule. The rule did not expire at the February term; but it stands until the cause is argued, and either party may take affidavits under it. Therefore the affidavits were properly taken.

May 1823.

Den
v
Stillwell.

IN MATTER OF ELIZABETH STEVENSON.

WHERE the portion of money arising from the sale of lands, in which the widow has a right of dower, is put out by commissioners on bond, according to the statute, *Revised Laws* 599, sec. 8, the bond should be taken in the name of the commissioners, and not of the widow.

Armstrong, applied to the court to know in whose name the bond, which was to be taken to secure the widows share of property which had been sold under the statute, *Revised Laws*, 599, sec. 8, should be taken.

CH. JUSTICE, said that the bond must be made to the commissioners, and not to the widow herself.

DEN *ex dem.* GREEN *against* STILLWELL, LIENS AND PROSSER.

THE CH. JUSTICE, said that in all special cases, or cases reserved, the plaintiff must open and reply.

ANONYMOUS.

HORNBLOWER, asked the court whether in a foreign attachment, where the defendant appeared and put in special bail, it was proper, since the passing of the act of 30th May, 1820, *Revised Laws* 734, sec 3, (by which the attachment is a lien upon the property, attached from the time of the issuing the attachment,) to enter a rule dissolving the attachment.

CH. JUSTICE, said he thought it would be sufficient to enter the ordinary rule, and insert therein a clause, "saving all liens created by the statute."

10b 60
64 804

May 1828.

WILLIAM SCOTT *against* G. H. CONOVER.Scott
v.
Conover.

Where money has been paid by defendant, under a judgment which is subsequently reversed, and it appears by the record, that such payment was made, the court will order restitution.

But where it does not appear by the record that the money has been paid, there the party must sue out a *scire facias quare restitutionem non*.

THE judgment in this case had been reversed, on a writ of error, after execution had been issued, and the amount of the money due on the judgment, had been paid by the defendant into the hands of the sheriff.

Wood, now applied for a writ of restitution, and read affidavits, proving the payment of the money by the defendant to the sheriff.

Wall, for the plaintiff, objected to the application; that a writ of restitution could only be awarded in those cases where it appeared by the record, that the money had been paid. But in this case there was no such evidence of the payment of the money, as would authorise the court to award a writ of restitution.

The form of the writ, *Archold's Practical Forms*, 199, shews that it must appear that the party applying for restitution has paid the money. In this case it does not appear that the money has been raised, but only that the defendant's property has been sold.

Wood, replied.

CH. JUSTICE. Two questions are presented to us upon this application. *First*. Whether the judgment being reversed on writ of error, we can order restitution. *Second*. For what sum restitution should be awarded, whether to the full amount, which has passed out of the hands of the defendant, into the hands of the officer, or only for that sum which has passed from the officer into the hands of the plaintiff. As to the first point, where it appears upon record that the money has been levied and paid over to the plaintiff, the court will order the restitution. But where it does not appear by the record, there the party seeking restitution, must sue out a *scire facias quare restitutionem non*;

May 1898.

Dea
v
Wood.

and to this the party may plead; and in *Lilly's Entries*, will be found the form of the plea.

In this case, it does not appear upon the record that the money has been paid, and at the common law a *scire facias* would be required; and we see no authority to change this practice. The affidavits cannot be said to be such record.

As to certioraris, to justices courts, upon the reversal of a justice's judgment, we do not put the party to the necessity of suing out a *scire facias quare restitutionem non*, because it would be too expensive. But as to proceedings in this court, we must pursue the common law practice. As to the second point, it is not necessary to give any opinion at present; but the court would refer the counsel to the case of *Montgomery v. Brucere*, where it appeared that the whole money had passed into the hands of the sheriff, and neither a part or the whole of the money had been paid by the sheriff to the plaintiff; and Mr. *Montgomery's* counsel resisted the application on that ground, and the court ordered restitution for the whole amount which had been paid into the hands of the sheriff.

Rule refused.

DEN *ex dem.* against WOOD AND OTHERS.

The affidavit to show that a witness lives out of the state, and thereby to obtain a commission for the examination of such witness, need not be taken on notice.

The commission may be opened by a judge in vacation.

An order for the issuing of the commission, of itself, stays the proceedings.

WALL, applied for a commission, to take the examination of a witness in this cause, and offered to read an affidavit.

L. Q. C. Elmer, objected to the reading of the affidavit, because it had not been taken on notice to plaintiff's attorney.

CH. JUSTICE. No notice of the taking an affidavit, to prove the absence of a witness out of the state, to found an application

for a commission need be given, to authorise the reading of the affidavit on the application. It does not stand on the same ground as an application to change the venue. The affidavit may be read.

May 1828.

M'Dermott
v
Butler.

Elmer, then objected, that the granting of the commission would delay the cause beyond the next circuit, which would be held before the commission could be returned to this court to be opened.

CH. JUSTICE. The commission may be opened by the judge in vacation; and it is not necessary that it should be returned to the Supreme Court to be opened.

An order for the issuing of the commission of itself, stays the proceedings, unless there is something in the order, authorising the suit to proceed in the mean time.

| 10 63
| 49c 579

ROBERT M'DERMOTT *ads.* THE STATE, ROBERT BUTLER, PROSECUTOR.

Upon the quashing of an attachment, for not obeying an award, the attorney of the defendant is entitled to the same costs as in other civil cases.

A WRIT of attachment for not obeying an award, had been quashed by this court at the term of September 1827. The attorney for M'Dermott made out his bill of costs, and inserted therein the same charges as are allowed in the Supreme Court, in all civil cases, by statute regulating fees. To this bill of costs, the counsel for Butler objected, and insisted that the defendant was not entitled to any costs.

The court directed the clerk to retax the bill, and to allow the following items:

	Attorney.	Court.	Clerk.
Motion for rule to quash writ	\$2.05	00	00
Court and clerk's fee on argument and rule	\$1.34		28
Clerk reading writ and return			28
Breviat, and copy, and counsel fee	\$3.68	00	00
Drawing costs and copy, taxing and filing	54	00	58

Green, for defendant.

Vanarsdalen, for Plaintiff.

CASES
DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
State of New-Jersey,
SEPTEMBER TERM 1828.

**ISAAC H. WILLIAMSON, ORDINARY, &c. against RICHARD SNOOK,
THOMAS STOUT, and NEAL HART.**

IN DEBT.

In an action on an administration bond, the judgment must be rendered for the penalty of the bond, and a court of law cannot assess damages upon it.

The only way the defendant can obtain relief against the payment of the penalty, is by applying to the ordinary for a stay of execution, or stay of sale, or such reasonable further time as may enable him to settle the estate in the Orphans' Court, in satisfaction of the bond and judgment.

Wm. Halsted, for the plaintiff.

Saxton, for the defendant.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by justice *Ford*.

FORD, J. This action is brought on the penalty of an administration bond, dated the 24th of January, 1824, against Richard Snook, administrator of Nathaniel Snook, deceased, and two other defendants, who are his securities. When the cause came on for trial, upon breaches assigned, the parties agreed on a case to the following effect: 1. That the bond was duly executed and delivered. 2. That on the 24th of May 1824, the administra-

Sept. 1828.

Ordinary
v.
Hart.

tor filed an inventory, amounting, by appraisement, to \$107.13. 3. That he hath made no account of his administration, but therein has wholly failed. 4. That the person upon whose petition, the ordinary allowed the bond to be put in suit, is a judgment creditor to the amount of \$28.63; beside, whom, there are other creditors to the amount of \$85.37 or upwards. 5. That the estate, which came to the possession of the administrator, amounted to the sum of \$112. 6. It is agreed that judgment be entered for the penalty of the bond, with or without damages, on occasion of the breaches, as the court shall deem lawful; or for the amount of the debt owing to the creditor on whose application the bond is prosecuted; or for the amount of the assets that came to the hands of the administrator; as the court may think ought to be done.

After an adjudication of this court, in case of the *Ordinary v. Robinson*, 1 *Halst.* 195, that no assessment of damages on an administration bond, could be made *at law*, it is not a little surprising, that *various projects*, for making one, should be presented in the state of this case.

The opinion in 1 *Halst.* was formed after two arguments, by learned counsel, and upon a deliberate examination of every case and *dictum*. It appeared that every effort, through a series of years, to obtain an assessment at law upon an administration bond, had uniformly failed. The obstacles to it were insurmountable, and no precedent of such an assessment was to be found in the books. Though the expedient of assigning for breach, the non payment of a debt owing to a particular creditor, had been repeatedly overruled; one of the judges of this court, at length came into it, and prevented the opinion in *Robinson's* case from being unanimous. If that expedient be now relinquished, (and it seems at present not to have a single advocate,) the opinion in 1 *Halst.* may be considered an unanimous one against an assessment; and that all we can do *at law* is, to give judgment for the penalty. Such was the opinion of the court in that case; and I am bold to say there never was a case, upon argument, in which this, or any court of law, went further.

But having myself been a concurring member of the bench, when that decision was made, it would not become me to repose silently on its authority; I shall therefore endeavour to demonstrate: that the assessment of damages, on an administra-

tion bond, belongs by statute to the Prerogative Court only ; that there is nothing in law or reason to prevent it from being done there ; and that a court of common law does not possess the means of assessing damages on such bonds.

Sept. 1822.

Ordinary

F.
Hart

First. The assessment of damages, on administration bonds, appertains by statute to the Prerogative Court. The 11th section of the act, *Rev. Laws* 177, prescribes the condition of these bonds ; and it is the same in substance with that prescribed by 22 and 23, *Car.* 2. The 12th section is in these words : "and in case any such bonds shall become forfeited, it shall be lawful for the ordinary or surrogate general, to cause the same to be prosecuted in any court of record, at the request of any party grieved by such forfeiture ; and the moneys recovered upon such bond shall be *applied* towards making good the damages sustained by the not performing the said condition, in such manner as the judge of the Prerogative Court shall, by his sentence or decree, direct." It will be conceded, that the statute means, by the word "*applied*," that the moneys recovered shall be *paid* towards making good the damages in such manner as the Prerogative Court shall direct. Before the ordinary can fulfil this direction, he must ascertain the persons injured, and the amount of each ones damages, or he will never know when he has made them good. If this court possessed the means of ascertaining the persons and the amount of each ones damages, still it could not lawfully use those means, because the statute directs it to be done by a sentence or decree of the Prerogative Court. Those injured, by non performance of the condition, will be the creditors of the intestate, and the next of kin ; the creditors according to the amount of their respective debts, when liquidated ; and the next of kin, according to the surplus that may be remaining for them after the debts are satisfied. The manner of ascertaining these sufferers, and of making good their respective damages, is to be such as the ordinary shall by his sentence direct. He will direct the administrator to settle the whole estate forthwith, in the Orphans' Court of the county, giving notice, by advertisement, to creditors to present their demands ; and to the next of kin to see that he is charged with the whole estate that came to his hands, or has been lost through his neglect. Without this or some similar manner to be by him directed, there is no intelligence, short of inspiration, that can tell the

Sept. 1828.

Ordinary

Hart.

amount of damages which *he is to make good* out of this bond. He must, by the most necessary implication, have power to ascertain the sufferers and their respective damages, or he can never know when he has performed his duty. It would therefore be flying in the face of this act, to attempt to take the duty out of his hands. To call a host of creditors into court, and liquidate their individual demands, so as to ascertain each ones damages under this bond, is a high *judicial* proceeding, 'worthy of that dignified court; and it would be a notable misconstruction, to take all that power into the hands of this court, (which is not so much as named in the act,) and leave to the Prerogative Court no more than the *low ministerial* office, of handing over money to certain persons mentioned in *our decree*, a form for which would have to be devised.

Secondly. There is nothing in law or reason to prevent this assessment from going to the ordinary. The idea that a court of *law* is bound, in this case, to assess damages under the act concerning obligations, *Rev. Laws 305, sec. 5*, is entirely new. That act provides indeed, that in every action upon any bond, with condition other than for the payment of money, the plaintiff shall assign breaches, and the jury shall assess damages upon such as the plaintiff shall prove to have been broken; but those provisions are not, and never have been held applicable to *administration bonds* for a variety of reasons. First. The Prerogative Court is appointed to ascertain who have been injured, and to *make good* their damages by reason of the breach of the condition; and it cannot for a moment be admitted that there are to be *double assessments*, one here, and one in that court. *Secondly.* A court of *law* does not possess the *means* of assessing damages on these bonds, as I shall presently shew; and it is for this reason that the power of doing it is vested elsewhere by statute. *Thirdly.* Damages on an administration bond, regard the *non execution of a trust*, the performance of which is to be *specifically enforced* in another court, and ought not to be obstructed by substituting definite damages in lieu and bar of that performance. *Fourthly.* The *statute 8 and 9 Wil. 3 ch. ss. sec. 3*, contains a provision, concerning obligations, exactly the same as our act which is a copy of it; yet that statute was never held applicable to administration bonds; nor can a case be found where assessments have been made upon them at law.

We must suppose the courts of Westminster profoundly stupid to have overlooked this statute ever since the 9 of *Wil. 3*, or else too learned ever to have supposed it applicable to these bonds.

Sept. 1828.

 Ordinary
 Hart.

There is as little ground for another idea, that if judgment is given, without an assessment, the administrator will have to raise the whole penalty, and deposit it as security in the Prerogative Court, before the ordinary will relieve against it. Now there is no such rule in the Prerogative Court. The idea is borrowed from *Rev. Laws 704, sec. 6*; which makes it a rule of the *Court of Chancery only*, and that too only upon an *injunction*, and where the merits are to be contested in a dispute between *third persons*. It has no relation to the Prerogative Court; and is confined entirely to cases of injunction. Here the ordinary is plaintiff in the cause. Must he grant an injunction against himself, to stay himself, in his own suit, until he allows the administrator sufficient time to settle the estate in the Orphans' Court? I do not think this objection needs further notice.

One motive assigned, for an assessment at law, on this particular bond, arises from an unaccountable and outrageous disproportion, supposed to exist between \$112, the amount of the estate, and the enormous penalty of \$2000. I shall presently shew that the sum of \$112, inserted in this case, ought to be rejected, as not being a fact within the issue, and altogether extrajudicial. But suppose it to be ever so outrageous, it is the penalty under which Mr. Snook voluntarily accepted the administration of the estate, and if he did not object to it then, he ought not to be allowed to do it now, after he has broken the bond.

Are we, in this collateral way, to correct a penalty, lying exclusively within the *legal discretion* of the ordinary and his surrogates? Or will the ordinary be less willing to assess *reasonable damages* because the penalty is unreasonable? be it greater or less, he will hold it only *as a security to compel this defaulting officer to settle the estate promptly in the Orphans' Court*. After all, it cannot be pretended that damages are to be assessed at law on these bonds, if the penalties are outrageous, but *not* to be assessed if the penalties are only *double*. They must all stand upon one rule.

Having shewn that the ordinary is appointed by statute, to *make good* to all persons the *damages sustained* by occasion of

Sept. 1828.

Ordinary

Hart.

the breach of the condition of an administration bond, and that he must have the whole penalty *if he should find it necessary for these purposes*. I shall next show that this court does not possess the *means* of making an assessment on these bonds, and that this is the true reason why the statute has appointed it to be done elsewhere.

It is easily to talk about assessments on these bonds. It has been talked about by the wisest judges for more than 150 years, (ever since the statute, 23 Car. 2) but without having been effected in a single instance. The doctrine during that time, has stood established. To those who are not fond of putting fixed principles afloat for the introduction of judicial novelties, one would suppose this argument enough of itself. But if a precedent is now for the first time to be made, the principles of it ought to be clearly settled. The bond being a security for *creditors*, and *next of kin*, the principles ought to be cautiously adopted; lest by liquidating damages too high we do an irreparable injury to the administrator; or by setting them too low, we do an irreparable injury to the creditors and *next of kin*. The ordinary, upon a petition presented to him in the Prerogative Court, would take undeniably the most *certain* course. He would order the administrator to do, what he ought to have done long ago, to advertise and settle the estate promptly in the Orphans' Court. There the creditors (who are totally unknown to this court) would have notice to produce their demands, and leave to unite with the next of kin, as parties, in bringing the whole estate to light, and in checking the administrator's accounts. When the debts were liquidated, and paid, and the surplus was paid over to the next of kin, then "*all the damages sustained by not performing the condition of the bond would be made good,*" and the ordinary would release the penalty or security. But if we assess the damages, it will necessarily preclude him from referring it to the Orphans' Court, inasmuch as there cannot be *two* assessments on the same bond. Whatever damages the verdict of a jury shall give to him, as plaintiff in the action, he will take; but he will be justly cautious of taking *more* than the verdict and judgment measured out to him. Indeed he could take no more; he would be debarred of more, under the 7th section of the act, *Rev. Laws* 306; for the administrator, upon payment of the *damages assessed*, would be entitled to have the judgment against himself and his securities discharged.

Sept 1828.

Ordinary
v.
Hart.

Now the only modes of assessing damages, at law, that have ever been suggested, are *two* ; one is, that old and exploded mode, so uniformly rejected in Westminster hall, but to which one of the judges inclined in the case of the *Ordinary v. Robinson*, of giving the amount of the debt owing to the particular creditor, who got liberty to prosecute the bond ; not considering that there can be but one assessment on a bond, (unless for breaches that *happen afterwards*, *Rev. Laws 306, sec. 7*) and therefore that the remedy for other creditors and next of kin, would be done away forever. But I forbear multiplying objections which would fairly lie against this mode of assignment, because I do not find now, an advocate for it left.

But a substitute is now devised, and it truly may be called *new*, as it is not to be found in any book, nor has been warranted by any judicial decision in the course of a century and a half, since the statute first prescribed the condition of these bonds. It is, to assess damages, to the whole amount of the intestate's estate, without any allowance for payments made to creditors, though the administrator shall have fairly paid out half, or two thirds, or even more, of all the estate that ever came to his hands. It assumes, gratuitously, that this court can ascertain the whole estate, in a simple action *on the bond*, in the absence of all the *creditors* and next of *kin*, who knew any thing of it and who, though deeply interested, are no parties to the suit, nor have so much as notice of the action. It may be said that the amount, *in this cause*, is already ascertained in the state of the case ; that the estate amounted to just \$112. Now, the practice of the surrogate-general, and of all his surrogates, is to take the penalty of the bond, as nearly as may be in double the amount of the estate, and as this is taken in the penalty of \$2000, a question naturally arises how the parties got the estate reduced so low, as the miserable sum of \$112. I do not mean to impute to these parties any unfair practices ; it would be highly ungenerous to do so in a case where I do not know, nor even suspect any ; but in other cases it is plain, that the amount of the estate must be taken either from the administrator, or from the prosecuting creditor, or both. Now against either, or both together, I enter a solemn protest, in behalf of the rights of honest creditors and next of kin. It ought not to be taken either upon the word or faith of an administrator, who has neglected his duty,

Sept. 1828.

Ordinary
Hart.

set his bond at defiance, trodden under foot his vows, and having wasted or squandered the estate, is deeply interested to disguise the amount of what he is accountable for, and make it as small as possible. To trust this matter to the prosecuting creditor, is nearly as objectionable. Being privy to his own debt, he may be presumed to know that. But it may not exceed five dollars. He may be the most ignorant man, for business, among all the creditors, and know least about the affairs of the intestate. It is not supposable that he will fling away his time, and double the amount of his debt, in hunting evidence for the benefit of creditors and next of kin, who though deeply interested, are absent, not knowing of his labors; and if they did, might not prize them, but see them with distrust. How easily might an administrator, who had wasted a great estate, hire the smallest, and most corrupt man that was to be found among the petty creditors, to apply for the prosecution of the bond, and under his unblest auspices get the amount so cut down, that creditors and next of kin, should loose all their money. It will not do to say, that he is appointed by the ordinary; his appointment is to prosecute the bond, but by no means to compromise, compound, or settle the estate. Nor will it do to say, that there is an inventory; for in many cases, none has ever been filed, and oftener it is a *meagre* document in which there is no account of bonds, notes or book accounts. Administrators are generally unwilling to charge such against themselves, until they receive something upon them; yet, though not in the inventory, they may constitute the most valuable part of the estate; beside which, under a decree for sale of lands, the administrator may get the whole real estate into his hands, and not a cent of it appear in the inventory. Now, what possible means have we of ascertaining the true account of the intestate's estate, in a collateral action upon the bond, when the Orphans' Court often find themselves barely able to effect it, upon a direct inquiry, though they can put the administrator (which we have no power to do) on his corporal oath, and moreover have the assistance of all the next of kin, to the intestate who knew his affairs, and of all the creditors who had relations with him in business. I think it is demonstrated therefore, that this court, in this action, does not possess *the means* of assessing damages on the plan proposed.

But if we possessed the means, I hold that it would be unlaw-

Sept 1828.

 Ordinary
 v.
 Hart.

ful to give damages in every case to the amount of the *whole estate*. If we make any assignment, it must be such *just and righteous* damages, as the ordinary is able to prove. Suppose the whole estate was \$10,000, and the administrator had paid out \$9,900 to creditors and next of kin, in just and legal priority, and only the inconsiderable sum of one hundred dollars lay back in his hands; could a judge conscientiously charge a jury to give ten thousand dollars of definite damages against the administrator, because there was one hundred that by some accident or delay remained unadministered? Or if he could, might he not expect some trouble in forcing the consciences of twelve honest men, acting under oath, into such a verdict! But if these difficulties were surmounted, at what an awful remove would the verdict stand from that mild, just and righteous assessment, that the ordinary would have directed to be made in the Orphans' Court, where the settlement of the estates of intestates lawfully belongs? Moreover, it is too evident to be concealed, that such a verdict would not be an assessment of damages, though falsely so called; it would be a penalty after all; a penalty *in lieu of damages*; one penalty in lieu of another; and under the most dangerous disguise. It will be in the legal form, and have all the appearance on record of real, liquidated damages, so as to preclude the ordinary from doing the same, as certainly there cannot be two assessments on one bond; nor would he venture to depart from what is done in this court upon the verdict of a jury, nor to give an appeal from their verdict to the Orphans' Court. He would decree the whole \$10,000 first to the payment of creditors, and *all the residue* he would divide among the next of kin. And this terrible destruction, would fall on the administrator's head, from our attempt to do what was never done before, and according to my understanding of the statute we have no right to do. I am therefore of opinion, according to the established course, that this court ought to do no more than render judgment for the penalty with costs. Let the administrator petition the ordinary for a stay of execution, or stay of sale, for such reasonable further time as may enable him to settle the estate in the Orphans' Court, in satisfaction of the bond and judgment.

Drake concurred.

CH. JUSTICE, said, that if the question was *res integra*, he should think that the assessment might be made at law, but un-

Sept. 1828.

Hutchinson
v
Coleman.

der the case of the *Ordinary v. Robinson*, 1 *Hals.* 195, the question was decided after two arguments, and acquiesced in, and upon the authority of that decision, he united in the opinion delivered.

Jadgment for the penalty of the bond.

10 74
70 398

SAMUEL HUTCHINSON *against* JAMES COLEMAN.

This court will set aside a verdict, and grant a new trial, if, in their opinion, the verdict is against the weight of evidence, or if justice has not been done.

THIS was an action of trespass, on the case, for flowing water back upon the plaintiff's mill. It was tried at the Burlington Court, before his honor justice Rossell, and a verdict found for the defendant. A rule to shew cause, why the verdict should not be set aside, was granted to the plaintiff, and upon the coming on of the argument.

Armstrong and *L. H. Stockton*, argued in support of the rule ; and

Wall, for the defendant.

The CH. JUSTICE, having been formerly counsel in the cause, delivered no opinion.

FORD, J. The plaintiff owns land on a stream of water, called Muddy Run, on which he has had a grist-mill from the year 1806, nearly thirty years. The defendant owns land on the same stream, next below, whereon he recently built a mill, that is, in 1824, and put a dam or stop across the stream, which stop he erected on the upper part of his farm, and within 45 feet of the plaintiff's line. The stream being very sluggish, so that the plaintiff's two wheels could seldom be used at the same time, and finding the fall in the stream equal to twenty-two inches on his own land, he published his intention to lower his mill-wheel, and the bed of the stream, as far as it run on his land, and employ those twenty-two inches as head ; accordingly he had given orders for effecting this improvement, before the defendant took a step towards building a mill below ; and when the defendant

Sept. 1828.

Hutchinson
v
Coleman

commenced that work, which excited in the plaintiff strong apprehensions from back water; the defendant gave assurances that it should not injure him, and disclaimed all right of flowing the water back on him. He then put the stop across the stream, which turns it into an open canal, cut for the purpose, and is said to afford a freer and better vent for the water than the natural course. The plaintiff insists, that this stop occasions back water, several inches high, on the sheathing of his wheel, half a mile above it. The defendant insists, that it backs the water, only, three hundred yards; that dead water on the sheathing of the plaintiff's wheel is a false pretence; or it arises from the plaintiff's wheel being sunk in a hole, which is lower than the bottom of the race-way; or because the race-way contains artificial obstructions, arising from an accumulation of sand bars, bushes, leaves, and mud, which require only to be cleared out. There were fifteen witnesses examined between the parties, and great conflicts of opinion. The jury found this stop to be no detriment to the upper mill, and gave a general verdict for the defendant. The plaintiff moves to have it set aside, on the single ground of its being against the weight of evidence. That the court have a legal discretion to set aside verdicts which appear to them to be clearly against the weight of evidence, is not deniable. 2 Pen. 578. 2 Archb. 253. A new trial only permits the matter to be deliberately reviewed, by another jury, for the better satisfaction of the court, and parties, under the advantages of a fuller and better preparation, on both sides, as it respects both the law and the facts.

Now the weight of evidence on the part of the plaintiff, constrains me to be in favor of a new trial, in order to afford a careful review of the opinions of those fifteen witnesses, so highly conflicting together, and of the reasons, which they assign for their differences. They were all credible, without one of them being impeached for want of veracity; and though nine of them swore fully to their belief, that the plaintiff was greatly injured in his mill, by means of the lower stop, the jury found a verdict against all their opinions, the other way; but, still, it was according to the opinions of five witnesses, who differed from the other nine. Now if these are weighed merely as opinions, disconnected with the reasons assigned for them, their weight is nearly as two to one against the verdict. But I do not lay much

Sept. 1828.

Hutchinson

v
Coleman.

stress on this argument, because a single opinion, supported by facts and good reasons, may reasonably outweigh two or three contrary ones, that are destitute of such support. This renders it necessary to examine, with some particularity, the reasons and facts on both sides.

Joseph Snedaker, a witness on the part of the plaintiff, knew the fall on the plaintiff's land by the best possible opportunities, because he was one of the persons who dug out the bottom of the stream, from the division line to the upper mill; and he testifies, that they kept the water running downward, through every step of their progress, till they got up to the sheathing of the plaintiff's former wheel, and that they came up twenty-two inches below it; and when the sheathing was lowered that twenty-two inches, the water still had a continual fall, through every inch of the plaintiff's land, down to the line between him and the defendant. Now the digging and levelling the bottom of this brook, was a work of some publicity; it took place at a country mill; it must have consumed some time; and may have been inspected by all the neighbourhood, yet not one of the defendant's six witnesses had the ocular demonstration of this man, nor does one of them impeach his veracity, or deny the facts which he thus establishes. Robert Quigley is another witness for the plaintiff, who worked at the same business, along with the witness last named, and confirms his statement in all things. Thus after lowering the plaintiff's wheel twenty-two inches, there remained a clear fall from it, through all his land, to the defendant's line. If these two witnesses needed corroboration, I think it would be found in Joseph Keeler, the mill-wright; he began to lower the plaintiff's wheel, before the defendant's stop was erected, and while the fall in the plaintiff's land was perfectly visible; he therefore not only could see, but it was his professional duty to see, whether the fall was clear or not; and he swears that he placed that sheathing a little *above* the water. It could not possibly have been below the bottom of the race, (or as the defendant alleges, in a *hole*) for then it could not have been *above*, it must have been *below* the surface of dead water that did not flow off. Neither of these witnesses has any connexion with the plaintiff's family, that I perceive, nor any apparent tie but truth. They do not testify merely to opinion, which we well know may be a little capricious, but they state

what are sometimes denominated stubborn facts, since they are not contradicted by any other eye witness, nor is their veracity impeached. Moreover the plaintiff gave orders to his workmen to drive up the bottom as nearly on a level as would consist with the smallest descent for water; and it must be merely gratuitous, that they reversed this order, and made the upper end the lowest, so as to place the mill in a hole, or in other words, that they made the water absurdly run toward the wheel, rather than downward from it.

There is no dispute worthy of notice, in relation to this present argument, touching the height of the defendant's stop, for though the witnesses differ about it as to a few inches, we shall assume the minimum which was twenty inches. Now when the upper mill began to work, it soon raised the water down at this stop to the top of it, and it was filled for the benefit of the mill below; if it had not filled, it would have been there to no purpose. Whether these twenty inches of obstruction, could be any detriment to the plaintiff's mill, would be best known to those, who had the best knowledge of the fall above; and as none of the defendant's five witnesses, had been concerned in adjusting that fall, their mere opinions were little superior to conjectures, made in a state of ignorance and darkness, compared with the exact intelligence of those witnesses who had adjusted this level, inch by inch, from the line, all the way to the sheathing of the upper wheel. If this verdict is not therefore against the weight of evidence, both as respects numbers and the best means of information, there is something in it at least mysterious.

The opinions conflicted chiefly about the extent of the back water, occasioned by this stop; those of the plaintiff's witnesses, saying it extended back to the mill, which those of the defendant would by no means admit, nor would they allow that it made the water back more than 300 yards; but to this extent they admitted the fact, and pointed out a sand-bar as its termination, where they spoke of a ripple in the water. Now only fifteen yards of these three hundred were on the defendant's land, the remaining two hundred and eighty-five yards of swell were on the plaintiff; and if the distance to the upper mill be half a mile, or eight hundred and eighty yards, then two hundred and eighty-five yards are nearly one third of the whole way,

Sept. 1828.

Hatchinson.

Coleman.

Sept. 1828.

Hutchinson

v
Coleman.

that it was confessed to make back water, in this sluggish stream, and on the plaintiff's land, thus taking away one third of the fall that belongs to his land, and for the enjoyment of which he had incurred two heavy expenses of levelling his race way for half a mile, and of new modeling and lowering his mill. There was no case cited at the bar, which takes away from an owner, this fall of water on his land, which is commonly valuable, and sometimes almost inestimable. And if there is no law which authorises an adjoining owner to take it, without grant, conveyance, or consideration, to his own use; what difference can there be in principle, between taking away the whole fall, or one third of it; for the owner of the whole, must be such of all the parts. "Every proprietor who claims a right either to *throw the water back above*, or to diminish the quantity of water which is to descend below, must in order to maintain his claim, either prove an actual grant, from the *proprietor affected by his operations*, or must prove an uninterrupted enjoyment of twenty years." *Simons and Stuarts Rep.* 190. 3 *Hals.* 149. It cannot be pretended, that by lowering the plaintiff's wheel, he diminished or increased the quantity of water descending below, or varied it in the smallest degree.

When the dam had made back water, three hundred yards above, the defendant's witnesses testified that there it stopped, at a bar in the race, but they neither shewed the height of this bar, the materials that composed it, nor the cause of its formation. If the height of it was three or four inches, the water might flow back to the upper wheel, in case this bar was removed, as the plaintiff's witnesses assert that it does in fact. The great question in my mind is, how the bar got there, after every thing of the kind had been removed, by the two witnesses who levelled it up; if they speak the truth, it must certainly be a recent formation; and what more likely cause can be assigned for its formation, than that this is the point at which the current frequently meets with dead water, and deposits its sand and sediment? On the whole it appears to me, that the merits of this cause deserve to be reviewed, and that the rule for a new trial ought to be made absolute.

DRAKE, J. This is a controversy between mill owners on the same stream. Their lands adjoin each other, and their mills are

Sept 1828.

Hutchinson

Coleman.

from one to one and a half miles apart. The plaintiff's mill is highest up on the stream, and has been in operation since 1806. In 1822, the mill being out of repair, the plaintiff began to make preparations to repair it, and conceiving that he had not taken the full advantage of the fall of water on his land, determined to sink his mill. Preparatory to which, he caused his tail race to be cleared out, commencing at, or near, the division line between him and the defendant, and deepening it as it approached his mill, and reducing it nearly to a level, leaving a gradual descent from the mill, merely sufficient for the water to run off. By this, he gained, as he was led to believe, nearly two feet of additional fall. In April 1824, he sunk his mill 18 inches. A little previous to this, the defendant put a stop, or obstruction, in the natural stream, about fifty feet below the division fence, with the view to raise and divert the water, through a race dug from the stream between the stop and division fence, and running down about half a mile to the mill site of the defendant: upon which he soon after built a mill. This obstruction raised the water in the natural stream, according to the plaintiff's witnesses, from fifteen to twenty inches. And one of them testifies, that the water, at the lower end of the plaintiff's tail race, 145 feet above the division line, was raised by means of the obstruction about 18 inches. From which it appears, that there was little or no fall between that point and the stop. And the defendant's witnesses admit, that the stop caused the water to flow back two or three hundred yards, but they say but little, directly, as to the height, to which the water was raised by it. One of them, however, says that he measured the water below the stop and found it 12 inches deep, when it was 18 or 20 above. The fact then is clear, that by means of the stop, or obstruction, the water was thrown back upon the plaintiff's land, for a considerable distance, to the depth of from 8 to 20 inches.

A question of law here presents itself of great and growing importance in New-Jersey; where water power, for the turning of machinery is already so much used, and where this application of it is constantly increasing. And I do not consider it necessary in this case, to examine the numerous, and in some measure conflicting cases, which have been decided in various courts, relating to the holding back, letting down, diversion, or other use of waters, by land or mill owners, to the prejudice of

Sept 1828.

Hutchinson

v.

Coleman.

others lower down on the same stream. I put this case upon the ordinary principles applicable to land. The owner of which has a right to its full enjoyment, in any fair way that its situation admits of, without interference from any other person. If a stream of water run through it, and there be, from the place, where it enters into, to the place, where it issues from, his land, a fall which can be advantageously improved, he has a right to make that improvement, to the full extent that it admits of. If the waters are damned below, and flow back, it is a trespass. If they overflow his lands, damages are immediately recoverable. But it is an invasion of his property without any overflowing of the banks. And if he wishes to build a mill, he has a right to make his improvement with reference to the fall of the natural stream; and if upon digging out his tail race, the water, by reason of a dam below, shall flow up his race and impede his mill, he has a just claim to damages to the full amount of the injury received. Twenty years adverse enjoyment by the mill owner below will bar his claim, as in other cases of adverse possession of real property. This is the only safe principle, applicable to this subject. To found the right merely upon occupancy, would be to throw open the whole water power of a river to a scramble for priority. And what shall be an occupancy? The building of a dam, and raising of the water? To make this *naked act* the foundation of a valuable right of property, would have no semblance of public policy to justify it. Shall it be the commencement of the building of a mill? What is its commencement? Shall it be its completion? Then the most important improvements, which require considerable time and great expense in constructing, are liable to be cut off and rendered useless, by an edifice raised in a week, and at a cost of fifty dollars.

It being then a clear case of invasion of the plaintiff's property, and it appearing also beyond doubt, that his mill was obstructed in its operations by the flowing back of the water, the only question before the jury was, whether this damage was occasioned by the stop, or by the plaintiff's own negligence in clearing out his race; and I would observe, preliminarily, that the defendant, by flowing back on the plaintiff's land was certainly in the wrong, and did an act calculated to injure him, and sufficient in itself to produce the injury complained of, and which inevitably must, in whole or in part, have caused that in-

Sept. 1828.

Hutchinson

F.
Coleman:

jury, if the plaintiff did, as he intended to do, sink his mill low enough to take advantage of his whole fall of water. Under such circumstances, upon the question as to the real cause of the mischief, a very slight preponderance of evidence is sufficient to justify a verdict against the defendant.

There is so much contradictory evidence in this case, and so much which, if believed, would justify the verdict, that at first view, I felt some doubt about the propriety of setting it aside: but upon closer inspection, there appears so much reason to believe that justice has not been done, that I think it a proper case for the exercise of this power of the court. Enough has been sworn to by the defendant's witnesses to justify the verdict, yet some of their opinions are so contradictory, and some of their facts so doubtful, when viewed in connexion with other established facts, that great suspicion rests in my mind upon the correctness of many material parts of their testimony. For instance, one of them says: "The making of the back water arises from the race being filled up. I do not think the stop is hurtful to plaintiff's mill. I think the stop could not back up the water, if the race was wide and deep enough to carry the water away." And yet the same witness says: "The plaintiff sunk his mill too low without a doubt, unless he got the right below." In the opinion of this witness then, the water would flow off from the plaintiff's mill totally unobstructed, if his tail-race was properly cleared out, (although probably one foot of his fall is taken by the defendant,) and yet he comes to the conclusion, that he sunk his mill too low. The same idea is held out by another of the defendant's witnesses, who says, that he advised the plaintiff to settle his mill two feet, and get the right so to do from the defendant; yet if it be true as the same witness says, that the widening and clearing out of the plaintiff's race "would prevent the water backing on him, and it would never injure him in the world," the plaintiff had a right to sink his mill more than two feet, without getting any liberty from the defendant at all, and could have enjoyed it when sunk. I will mention another of this witness' opinions. Although, he says, that after the raising of the stop, "it backed water about 300 yards," (that is, about 285 yards on the plaintiff's land,) "when the mill was still," and although he further testifies, that "the height of water is affected and is more or less high, as the mill above is or is not

Sept. 1828.

Hutchinson

v.

Coleman.

at work," which is unquestionably true, yet he is not only sure that the plaintiff sustains no injury by this flowing back of the water, not even in the increased difficulty of clearing out his race, but goes so far as to say, that "he considers this an improvement to his mill." These witnesses were well acquainted with the premises, and from their occupations might be considered well qualified to judge in this case, and no doubt had an influence with the jury beyond what a careful examination of their testimony appears to justify.

But again, this stop was placed a very short distance below the division line between the parties; and it is fairly to be gathered from the testimony, that there was no fall between the line and the stop. If this be so, the stop cannot benefit the defendant without invading the rights of the plaintiff. If it add one inch to the head of the defendant, it takes that inch from the fall of the plaintiff. It was the defendant's object in creating this obstruction, that it should increase his head of water, and the evidence is distinct and conclusive that it does so, and that the water is thrown back upon the plaintiff's land. Here is a clear invasion of the plaintiff's rights, and a sufficient cause for all the injury he received. And when a long list of witnesses, united in ascribing the actual injury solely to this cause, while the defendant's witnesses ascribe it solely to the foulness of the race; and when there is so much reason to believe it was in some measure owing to both causes, and this is the best mode of reconciling the testimony, I cannot but think that the weight of evidence strongly inclined to the side of the plaintiff.

This, in some cases, would not be sufficient to disturb a verdict. But, in this case, the controversy is important, there is much reason to believe that justice has not been done; the evidence is flatly contradictory on points, where the truth is capable of being shewn with certainty; which the parties, on a second trial, may be able to do; and which, on the first, they have not been prevented from doing by negligence; each having made a reasonable preparation for the trial; but each, no doubt, being disappointed in the adverse testimony, especially upon several points where the evidence is so contradictory, that the witnesses, upon one side or the other, must have grossly mistaken or wilfully misrepresented the facts.

Let the rule for a new trial be made absolute.

Sept. 1828.

THE STATE *against* LAMBERT RICKEY.State
v.
Rickey.

A plea in abatement, to an indictment for embezzling money of a bank, "That one of the jurors sworn on the grand jury, was a stockholder in said bank, and possessed a large amount of its promissory notes, and was greatly interested in procuring said indictment," is bad on general demurrer.

So, also, a plea in abatement, "That two of the persons, sworn as members of the grand jury, had, before they were sworn, formed and publicly expressed opinions unfavourable and prejudicial to the defendant," is bad on general demurrer.

An allegation in a plea in abatement, "That certain persons" (naming them) "were sworn and charged as members of the grand jury," is sufficiently certain without stating that they served on the grand jury.

An indictment, for embezzling the money of the President, Directors, and Company of the State Bank at Trenton, was found against the defendant, by the grand jury of the county of Hunterdon, at the Quarter Sessions of said county, in February 1827, and was removed by *certiorari* into the Supreme Court. The defendant, being charged on an indictment, pleaded not guilty, but afterwards obtained leave of the court to withdraw the plea of the general issue, for the purpose of moving to quash the indictment. The motion to quash having failed,* the defendant pleaded several matters in abatement, the substance of which is stated in the opinion of *Justice Ford*.

To this plea the attorney for the state filed a general demurrer; and the defendant joined in demurrer.

Wm. Halsted, for the state, argued in support of the demurrer.

Hamilton, for the defendant.

FORD, J. The grand jury of the county of Hunterdon, presented an indictment against Lambert Rickey, the defendant, for embezzling the money of the State Bank at Trenton, and the same being removed into this court by *certiorari*, a plea in abatement was put in by the defendant, containing the following matters. *First*. That one of the jurors sworn and charged on the

* NOTE. The motion to quash, in this case, was for a defect in the panel of the grand jury; and was decided in the case of the state against Rickey and others. 4 *Halst. Rep.* 293.

Sept. 1828.

State
v.
Rickey.

said grand jury, was a stockholder in the capital stock of said company, and also possessed a large amount of the promissory notes of said bank, and was greatly *interested* in procuring the said indictment ; whereby he became disqualified and incompetent to be sworn on said jury. *Second plea.* That two of the persons so sworn and charged as members of the grand jury, had, before they were so sworn, formed and publicly expressed opinions that were unfavorable and prejudicial to the defendant, by declaring their determination to have him indicted, and by declaring that nothing else would have induced them to attend the court at that time ; by reason whereof (&c. as before.) The attorney-general demurred to these pleas, and thereupon took three exceptions.

First, to the form of the plea ; for that it does not allege that the said persons or either of them *served* on the grand jury, but only that they were *sworn and charged* as members. Now it is true that the word *served* has not been inserted in the plea ; but the words sworn and charged, are certain enough to the same intent, for they are words appropriated in law, in the caption of every indictment, to designate who were the actual members of the grand jury. 2 Bl. Com. appendix 2.

The *Second* exception is this, that the plea founds the incompetency of the juror upon his being a stockholder, and upon his possessing a large amount of the promissory notes of the bank, (supposed to have been defrauded by the alleged embezzlement) from all which an inference is drawn that the juror was *interested* between the state and the offender, whereas the juror could neither gain or lose by the event of the prosecution. Now, I take this answer to incompetency, arising from a supposed interest in the juror, to be satisfactory and complete. The idea that a private person may be interested in a public prosecution, seems to be utterly discarded in law. There is not a case, with the single exception of forgery, in which the idea has been countenanced in a court of law, and even there it rests on such doubtful grounds, that no judge has assigned a satisfactory reason for it, except that it has been for a long time so adjudged. That the law never admits the idea, now suggested, of private interest in a public prosecution, may appear from more instances than it would be proper to enumerate on account of time. Thus a person who has been defrauded of his goods by false tokens,

Sept 1828.

State
v.
Rickey.

is a competent witness to prove the indictment, although, on the face of it, he is the person charged to have been defrauded ; and the reason is, that however he may be interested in the transactions themselves, he can have no private interest in the public prosecution. So it is in assault and battery, larceny, robbery, and every misdemeanor for cheating, the person who is charged to be assaulted, stolen from, robbed or cheated, has always been held to be a disinterested and competent witness between the state and the person accused. The interest of this grand juror in the company is admitted ; so likewise, it is his interest to receive payment for the notes, if possible, that he holds against the bank ; yet he is not interested beyond that common interest, which every member of society must feel in the conviction of such persons as offend against the peace, the order and well being of society. The punishment which would ensue a conviction of the offence here charged, would rather lessen the offender's ability to make reparation for the private injury ; and I am utterly at a loss to see, in what manner this prosecution could possibly enure to the personal benefit of the juror. Is it supposable, that the stock of a bank that is broken or crippled, will rise in its credit or value in the public estimation by exposing to public view, a heavy embezzlement of the very funds on the safety of which its whole value depended, and without which it has no value ? But enough has been said to do away the idea, as I trust, of any such private interest, as would disqualify this stockholder for serving as a grand juror.

The *third* exception, which applies to the residue of the plea, being no more than a challenge to the favour, is, that it comes too late. I have had great difficulty in finding out what the law really is upon this point. It appears never to have made its appearance before this time in a court of justice, though in point of fact the case must have been occurring for centuries ; and if there be a like case in the books, my misfortune has been not to discover it. In the case of Col. Burr, the challenges to grand jurymen were all taken *before they were sworn*. The case of the *State v. Rockafellow*, 1 *Hals.* 343, was not a challenge to the *favour* ; it was matter of *principal* challenge for want of a leading qualification required by statute ; and though I subscribe to the doctrine of the court there delivered, and do not see how the court would have done otherwise, *upon the facts admitted*

Sept. 1823.

State
v.
Rickey.

by the demurrer, it may lead to very inconvenient results, if carried a single inch beyond the precise circumstances of that very case. If such a plea should be traversed, the court might find great difficulty in permitting those very *counsels* of the grand jury room, to be pumped out of witnesses by the force of their authority, which had just before been employed in imposing an oath on each grand jurymen to keep secret. And that not to elicit the evidence of a *crime*, in which public justice was concerned, but to establish a mere irregularity for the purpose of arresting a public prosecution; and when the defendant was as likely to be guilty as if the irregularity had never happened. But, without meaning to disturb that case, my impression is, that it has no bearing on the present; and, in the absence of all cases, I find no principle on which to maintain the present plea. But, on the other hand, I find much against it. The matter is a challenge to the polls for favor, which the law always requires to be made before the juror is sworn, and here it is not made till after he has been sworn and acted. If taken at the proper time, it will only remove the juror, and allow of another in his place; but, if allowed in this shape, it will invalidate the proceedings of all the other good and unexceptionable men on the jury. If taken at the proper time, the question whether the juror was indifferent or not would have been tried by *triors*; but if taken in the form of a plea in abatement, the *established* mode of trial will be changed for that of a full jury of twelve men. It is the most expensive form in which the matter can be presented, and the policy of the law requires it to be done in a summary way. It may be used as an engine of great delay, so as that a new indictment may be impracticable on account of the statute of limitations, before the old one comes to be quashed, and guilty offenders will, if they are able, seek impunity under it for their crimes, and make it a refuge against public justice, turning it into ridicule and contempt. Finally, there is no such plea as this to be found among the records and monuments of the law; it is *sui generis*, not alone without precedent (whereof the books had been filled, if past ages had deemed such matter pleadable) but contrary to all precedents which are the other way. Such are the reasons as they occur to me at present for adopting the general conclusion that this plea is inadmissible in all its parts.

Lastly. If the matter of the plea, does not admit of being set

up in this stage of the proceedings, the consequence is that it must be overruled, whether the verification of it be in form or not, and, therefore, any opinion on that point would be useless in this case.

Sept. 1828.

Gulick
v
Bailey.

DRAKE, concurred.

CH. JUSTICE, delivered no opinion, being a stockholder in the bank.

Plea overruled.

JOHN GULICK and WILLIAM GULICK *against* THOMAS WARD and CHESTER BAILEY, SURVIVORS OF JOSEPH LYON, DECEASED.

10	87
50	788
10	87
60	286

A contract which contravenes the policy of an act of congress and tends to defraud the United States, is void.

If A. agree to give B. 1000 dollars, on condition that B. will forbear to propose or offer himself to the post master general to carry the mail on a mail route; such agreement is against public policy, and no action can be maintained upon it.

WOOD, for the plaintiffs; and

W. Chetwood and M. Ogden, for the defendants.

The facts in this case are sufficiently developed in the opinions delivered.

EWING, C. J. This action was brought to recover the sum of \$1000, stipulated in a written agreement, to be paid by the defendants to the plaintiffs. Upon the trial at the Circuit Court, the defendants insisted that the promise was void, because the consideration was illegal, and the plaintiffs were therefore not entitled to recover. The judge reserved the question for determination here, and a verdict was rendered for the plaintiffs, which the defendants now seek to set aside. The agreement between the parties, and the consideration of the promise are fully developed in the declaration, which is in these words:

"Whereas, on the 20th day of September, in the year of our

Sept. 1828.

Gulick
v.
Bailey.

Lord eighteen hundred and twenty-three, the post-master general of the United States of America, at the city of Washington, in the district of Columbia, to wit, at New-Brunswick, in the county of Middlesex, was minded, and intended to make a contract with good and responsible men, for carrying at a fair and reasonable price, to be agreed upon by the said post-master general, and such men, the mail of the United States from the city of Philadelphia to the city of New-York, for such a term or time as might be agreed upon between them; and whereas, the said William Gulick and John Gulick, did propose, and intend to endeavour to obtain the said contract, to carry the said mail, between the said cities, at such just and reasonable price, and were well provided, with horses, stages, sulkies and drivers, and were recommended and known to the said post-master general, to be thus provided; and to be of good reputation and credit, and to be relied on for the faithful performance of all and every agreement they should make in the premises, and were attending on the day and year aforesaid, at the said city of Washington, to offer for and endeavour to procure such contract; and whereas also, the said Isaac Ward, and also one Chester Bailey, (whom the sheriff of the county of Essex has returned, not to be found in his bailiwick) and also one Thomas Lyon, now deceased, and whom the said Isaac and Chester have survived, were also minding and intending to procure for themselves, the said contract, at a just and reasonable price, and were also of good credit and repute, and provided in like manner, to perform any agreement which they might make in the premises, with the said post-master general, and were also personally attending at the said city of Washington, but were apprehensive that as the said John Gulick, had for many years before that time, carried the said mail, over a large part of the said route, and was well known and esteemed by the said post-master general, as a faithful and a punctual man in the performance of his engagements, that the said John Gulick, and the said William Gulick might, on those accounts, be preferred and obtain the said contract. Whereupon, in consideration of the said premises, and also in consideration that the said John Gulick and William Gulick, would forbear to propose or offer themselves to the said post-master general, and also forbear to procure any other persons to propose to him, to carry the said mail on the

Sept 1838.

Gulick
v.
Bailey.

route aforesaid, or any part thereof, for such time and term as should be included in the contract, then intended to be made. They, the said Isaac Ward, Chester Bailey and Thomas Lyon, in his life time, on the year and day aforesaid, at Washington, to wit, at New-Brunswick, in the county of Middlesex, undertook and faithfully promised the said John Gulick and William Gulick, that if they the said Isaac, Chester and Thomas, should become contractors as aforesaid, they would pay unto the said John Gulick and William Gulick, the sum of one thousand dollars, in sixty days after the first day of January, then next ensuing, and the said John Gulick and William Gulick say, that confiding in the said promise, and undertaking of the said Isaac, Chester and Thomas, they did from the time of making thereof wholly forbear from proposing or offering themselves to the said post-master general, and from causing any of the persons to offer to carry the said mail on the said route, or any part thereof, for the time of the said contract; and they the said Isaac, Chester and Thomas, (being preferred by the said post-master general, to any other candidates for the said contract) did obtain the said contract, for carrying the said mail on the said route, at a just and reasonable price, for the time and term of four years, and have enjoyed the benefits, advantages and compensation, in the said contract, secured to such contractors. By reason of which said premises, the said Isaac, Chester and Thomas, in his life time, and the said Isaac and Chester, since his death, became liable to pay unto the said John and William, the said sum of one thousand dollars, in sixty days after the first day of January, in the year of our Lord eighteen hundred and twenty-four, according to the form and effect of the said promise and undertaking."

Is this promise valid? Is the consideration of it legal?

By the act of the congress of the United States, regulating the post office establishment, 4 *Vol. Ed.* of 1816, 293, *sec. 8*, it is enacted, That it shall be the duty of the post-master general to give public notice, in one or more of the newspapers published at the seat of government of the United States; and in one or more of the newspapers published in the state, or states, or territory, where the contract is to be performed, for at least six weeks before entering into any contract for carrying the mail, that such contract is intended to be made, and the day on which it is to be concluded, describing the places from and to which

Sept. 1828.

Gulick
Bailey.

such mail is to be conveyed, the time at which it is to be made up, and the day and hour at which it is to be delivered. He shall moreover, within ninety days after the making of any contract, lodge a duplicate thereof, together with the proposals, which he shall have received respecting it, in the office of the comptroller of the Treasury of the United States.

Persuant to the requirement of the act of congress, the post-master general had given public notice of his intention to contract, and his readiness to receive proposals, for carrying the mail between the cities of Philadelphia and New-York. The parties in this suit, in consequence of this notice, attended at Washington, intending to offer proposals, when the arrangement stated in the declaration was there made between them, the plaintiffs relinquished their intention, and the contract was made by the post-master general with the defendants.

The policy of the provision contained in the act of congress requiring this procedure by the post-master general, in thus publicly inviting proposals is, to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner, and upon fair, just, and reasonable terms. The principle is the same as requires a sheriff or executor to give public notice of the sale he is about to make, or induces an individual publicly to announce the vendue of his property. Now an arrangement which shall diminish the number of competitors, lessen the number of proposals, or induce any one or more to abandon his intention of making an offer to contract, is most evidently in direct contravention of the policy of the act of congress, and tends to defraud, or perhaps it may be broadly asserted, does at all times actually defraud the United States. It defeats the policy of the statute, for it destroys the competition and precludes the advantages which inevitably result from it. The expense to the government is certainly augmented. Of two individuals who are willing to perform the service for the same remuneration, one may, for various reasons, be far more eligible than the other. But the most eligible may be induced to withdraw. It operates to defraud the United States. The premium paid to prevent competition is directly or indirectly charged upon them. The terms proposed are always calculated to

Sept. 1828.

Gulick
v.
Bailey.

cover the expenditure. The corollary is indisputable, that if the successful contractor can afford to pay one thousand dollars to induce a rival to stand out of his way, he can, if not compelled to make such payment, afford to perform the service for precisely that sum less than the recompense he is to receive from the post-master general. To the contractor it is exactly the same, whether he reduces the sum he requires from the public one thousand dollars, or whether he pays that sum to his intended competitor. If in the present case, the defendant could afford to pay to the plaintiffs one thousand dollars, it is conclusive evidence that they required of the public that sum more than the service they were to perform was justly worth. The evidence produced on the trial of this cause, and detailed in the state of the case before us, fully proves the truth of these remarks, the importance of the competition, and the effects of it upon the interest of the public service. After the defendants had induced the plaintiffs to abandon their intention of making proposals, and had exhibited their offer, they discovered very unexpectedly another competitor, and that another proposal was made which they had not anticipated nor silenced. They immediately lowered their proposal one thousand five hundred dollars, and this too, to prevail against persons who were not like the plaintiffs, "well provided with horses, stages, sulkies, and drivers," and who had, not like them, been accustomed to carry the mail on the route in question, and whose ability and experience the post-master general might therefore justly hold in high estimation. The circumstances disclosed on the trial, then, most manifestly support the conclusion naturally drawn from the agreement itself; that in object and effect it was inconsistent with the policy of the act of congress, and tended, to say the best, to defraud the United States.

The principles of law, which compel a court to refuse to enforce a promise founded on such consideration, are very clear, very salutary, and perfectly well established. In *Jones v. Randall*, *Coup.* 39, Lord Mansfield and the court of Kings Bench, held that "many contracts which are not against morality, are still void as being against the maxims of sound policy." In *Blachford v. Preston*, 8 T. R. 95, Lawrence J. said, "a plaintiff cannot recover in a court of justice, whose cause of action arises out of a contract made between him and the defendant

Sept. 1828.

Gulick

Bailey

in fraud, or to the prejudice of third persons." And on that ground, as well as because it was contrary to the principles of public policy to allow of such contracts as that before the court, he held that the plaintiff could not maintain his action. In *Mitchell v. Smith*, 1 *Binney*, 120, the Supreme Court of Pennsylvania held that contracts to violate the rules of decency or morality, or oppose principles of sound policy of the country are illegal and void. In *Sterling v. Sinnickson*, 2 *South*. 756, Chief Justice *Kirkpatrick* said, "if the consideration be against the public policy, it is insufficient to support the contract;" and Justice *Rosell* said, "it is a general principle that all obligations for any matter, operating against the public policy and interests of the nation, are void." In 3 *Halsted* 54, a note made by a candidate for the office of sheriff, in consideration of a promise to give him the interest of the payee at the election, was held illegal and irrecoverable. In *Parsons v. Thompson*, 6 *Hen. Bl.* 322, the plaintiff had long been master-joiner of the dock yard at Chatham, and was entitled to be superannuated and to retire on a pension; the defendant wishing the office, promised if he would retire, in case he should obtain the office, as he afterwards did, to allow a certain portion of the proceeds, to recover which, the action was brought. The court had held that the agreement made without the knowledge or sanction of the admiralty, who held the power of appointment, had no sufficient consideration to maintain an action. In *Hannay v. Eve*, 3 *Cranch* 247, the Supreme Court of the United States held, that an agreement made between foreign mariners to save a ship and cargo, under the semblance of a condemnation in the Admiralty Court here, was not an immoral act, but a stratagem authorised by the laws of war; yet as it was a fraud on a resolution of congress, that is to say, a contrivance to evade the resolution, the courts of the United States could furnish no aid in giving efficacy to it. In *Jones v. Caswell*, 3 *John. Cases* 29. In consideration of forbearance or omission to bid, at a sheriff's sale of real estate, a promissory note on which this action was brought, was given by the defendant who became a purchaser. The consideration was held to be illegal and the note irrecoverable. Justice *Radcliff* said, "it was a consideration which ought not to be sanctioned in a Court of Justice. The law has regulated sales on execution with a jealous care, and enjoined such proceedings as are likely

Sept 1828.

Gulick
p
Bailey.

to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy." *Justice Kent* said, "It was a consideration against public policy, which encourages bidding at sales on execution. I think the consideration must be adjudged void as against public policy, and the interests of the original debtor whose property was liable to be sacrificed by such combinations." In *Doolin v. Ward*, 6 John. 194, certain articles were to be sold by auction, at the navy yard; at Brooklyn, and the parties being desirous to purchase, agreed that the plaintiff should not bid against the defendant, who should purchase the articles and afterwards divide equally, it was held that the contract was without consideration, and void, and against public policy. In *Wilbur v. How*, 8 John. 444, a contract or job for making a road, being set up at auction, the parties agreed that if either bid it off, it should be divided between them. One bid it off and refused to give the other a share. The court held that the contract was a *nudum pactum* and a fraud on the vender. In *Thompson v. Davies*, 13 John. 112, the court decided that an agreement, which tended to prevent competition at a sale under execution, was contrary to public policy and void. *Spencer, J.* in delivering the opinion of the court said, "It had been urged that the plaintiff was not bound to bid on the second execution, and was therefore at liberty to enter into this agreement. That is not the test of the principle. In none of the cases cited was the party bound to bid, but being at liberty to bid, he suffered himself to be bought off in a way which might prevent a fair competition. The abstaining from bidding upon consent and by agreement, under the promise of a benefit, for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one, but there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtors property is inevitable."

It was insisted by the plaintiff's counsel, on the argument, that some of these cases have no application here, because the proceeding on the part of the post-master general is not an auction. It is of very little importance by what name it is most aptly to be designated, if the principles illustrated by these cases may be justly brought to bear upon it. Yet is there any radical difference? Is a proposal in writing less a bid than a verbal offer? Is the Dutch mode of sale not an auction, because the bidding

Sept. 1928.

Gulick
v.
Bailey

are downward? Does it lose the name of auction when it happens that no more than one bid has been made by any one bidder when the article is struck off? May not a Sheriff or executor, like the post-master general, if no just and competent offer be made, decline, by striking off the property, to accept either and adjourn the sale to a more favourable season, and for new and better offers? Is not the competition equally desirable in the one as in the other case? Is not the combination, which may silence a bidder alike prejudicial? If a party be bought off, does it not in both cases prevent a fair competition? Is not the abstaining from bidding under the promise of a benefit as much in the one as in the other case, an evil which the law does and ought to repress? It may not be unworthy of notice, though it may not deserve to aid the argument, that the post-master general in his advertisements, one of which I have recently seen, speaks of the persons offering proposals as bidders.

It was farther insisted, that the object of the section of the act of congress was simply to point out the mode whereby publicity should be given, and a competition be brought about and nothing more. But it is clear that this view of the matter falls below the wisdom of the act. Why induce a competition unless to subserve some valuable purpose? And can it be possible that this purpose shall be defeated with impunity? Can it be possible that even the courts of the United States are obliged to give their aid, and yield their power to enforce a contract avowedly designed to counteract this purpose, and to deprive the government of the most valuable benefits this competition was designed to attain?

The cases cited and relied on by the counsel of the plaintiffs, do not in the slightest measure conflict with those which I have referred to, nor establish any principle which can support the contract made between these parties. In *Hutton v. Lewis*, 5 T. R. 639, the plaintiff, the master of an academy, agreed to relinquish his situation in favor of the defendant, to grant him a lease of the house, and to assign him part of the household furniture and fixtures at a valuation, in consideration of which the defendant agreed to pay the plaintiff an annuity. This annuity was sustained. But the public was not injured by the change of schoolmasters, unless indeed the one was preferable to the other, which the case does not evince or assert. The case of

Sept. 1828.

Gulick
Bailey.

Davis v. Mason 5 T. R. 48, shews that a bond restraining a person from exercising a trade or profession in a particular place may, on proper consideration, be valid, while an obligation not to exercise it at any time or place would be illegal. Now the ground on which this decision rests, is that such an agreement is not in its tendency injurious to the public. It is of little importance that the tradesman is excluded from one spot while every other place is open to him. This position is expressly assumed by the Supreme Court of Massachusetts, in another of the cases cited for the plaintiff. *Pierce v. Fuller*, 8 Mass. 223. The defendant who had been running a stage from Boston to Providence, entered into an obligation not to run there in opposition to the stage the plaintiff had, or contemplated to, set up. The court held the agreement valid. They said "bonds to restrain trade in general, are unquestionably bad as tending to create a monopoly injurious to the public. But bonds to restrain trade in a particular place, may be good if executed for a sufficient and reasonable consideration. The public appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage, for it could not be in opposition to the plaintiff's stage, and it is indifferent to the public which of these run a stage." So in the case of *Perkins v. Lyman*, 9 Mass. 522, where the agreement that the defendant would not be interested in any voyage to the north west coast of America for seven years, was held good. The court said, the principle relied on to shew the invalidity of the agreement, as against the policy of the law being in restraint of trade, did not apply. This is a trade but lately discovered, and can be beneficial to but a small number of adventurers. One adventurer, may engage to retire from it for a valuable consideration. Instead of an injury to the public, the community may receive a benefit from such a procedure, as it will go to prevent the trade from being overdone, and so becoming profitable to none. The case of *Parker v. Brown*. Cro. Jac. 612, seemed to be mainly relied on by the plaintiff's counsel. The parties being both applicants to the sheriff of Middlesex for the office of under sheriff, the defendant, in consideration that the plaintiff would desist, promised, if he obtained the office, to pay him a sum of money. The court held the consideration to be lawful and the promise valid. Whether such a consideration would at the present day be

Sent. 1828.

Gulick

Bailey.

deemed sufficient and legal might perhaps admit of question. But taking the case to be correctly decided, there is nothing in it which bears analogy to the matter now in discussion. Neither the sheriff nor the public were or could be prejudiced by the withdrawal of one of the applicants. No competition was to be fostered. Public policy did not require the anxious rivalry of candidates perhaps, indeed, was best promoted by leaving the sheriff to unbiassed and unsolicited selection. There was no interest either public or private which could suffer from the absence of competition.

It was farther said, that the policy to defeat which is forbidden, must be general in its nature : as a contract to trade no where, or not to marry at all, is bad, while a contract not to trade in a particular place, or not to marry a particular person, will be sustained. But most of the cases referred to furnish an answer to this argument. While they shew that some specified cases are not against public policy, and therefore are not illegal, they prove that a contract which does contravene it will not be enforced. These cases therefore, directly apply to the contract before us, if it has been made to appear that it is against public policy ; otherwise it is admitted, they do not apply. The real question is not whether the contract be general or special, but whether its object is reproachable. The agreements respecting actions which have been condemned were not to abstain from bidding at all auctions, but in a specific instance. Moreover, a contract whose tendency is directly to prejudice a third person, whether general or particular, can meet with no countenance.

The plaintiff's counsel further contends, that the arrangement made between these parties cannot be wrong, because they might have united, made joint proposals ; and thereby avoided collision as the defendants had done, and had become joint contractors. But the cases are widely different. The union of persons openly making a joint proposal, is fairly communicated and avowed to the post-master general. Such an union may serve to ensure a faithful, regular and able transportation of the mail. The post-master general holds the responsibility of all who are to derive emolument. No one reaps the reward without sharing the risk. A joint offer openly made enables him to decline it, if thereby the public interests may be best promoted. He may improve its advantages and guard against its inconveniences.

I am of opinion the consideration of the promise made by the defendants was unlawful; the plaintiffs are not entitled to recover; and the verdict ought to be set aside, and without the payment of costs.

Sept. 1828.

Gulick
r
Bailey.

FORD, J. In pursuance of an advertisement of the post-master general of the United States, that he would receive proposals for a contract to carry the mail between Philadelphia and New-York, these parties both repaired to Washington, where the defendants finding no rival applicants in attendance but the plaintiffs, came to a private agreement to pay them a thousand dollars, if they would not themselves propose to carry the mail, nor procure others to do so, on any part of that route, for the next ensuing contract; it was for non payment of the money so promised, that the plaintiffs brought the present action. The jury found a verdict for the plaintiffs, but it was understood to be subject to the opinion of the court at bar, on several points that were offered for a nonsuit at the trial of the cause. Accordingly the defendants moved for a new trial upon those grounds; and upon an allegation, that the verdict is contrary to, and against the weight of evidence.

The first ground for a nonsuit was one that grew out of an objection to the declaration, for stating the consideration of the promise differently from the statement of it in the article of agreement. The article, after stating the foregoing promise, contained a further agreement, that the defendants should take of William Gulick, one of the plaintiffs, two mail coach teams and his proportion of the mail coaches, then running on the line, at an appraisement to be made by three men, to be mutually agreed on between the parties; the taking of which teams and coaches was argued by the defendants, to be a part of the consideration on which they agreed to pay the thousand dollars, and yet no mention of those teams and coaches is stated in the agreement as set out in the declaration. I think, however, that the objection is founded on an erroneous conception of the agreement. In consideration that the plaintiffs would not propose for the carriage of the mail, the defendants took upon themselves two things, to pay the plaintiffs a thousand dollars, and to take, of one of the plaintiffs, his teams and coaches at a valuation. The whole consideration was, that the plaintiffs should

Sept. 1838.

Gulick
v
Bailey.

not propose ; and this is set out in the declaration ; but it was not necessary to set out more promises than those, for the breach of which the plaintiffs demanded recompence ; as where, for a *certain consideration*, the declaration laid the promises to have been, that the defendant would deliver him a horse worth £80, which should be a young horse ; and the agreement produced was, that he should be a horse worth £80, and a young horse, and be warranted to be *sound*, and never to have been in harness, yet the declaration was holden to be good. 1 *Chit.* 299 ; 8 *East* 7, *Miles v. Sheward*.

The *second* ground alleged is, that this contract was contrary to public policy, contrary to the provisions of the act of Congress, and therefore a *nudum pactum* that would not support an action. It cannot be doubted that the contract was *nudum pactum*, if the consideration was illegal and against public policy, for an illegal consideration is as none. Was it then illegal as being against public policy ? It is certain that the post-master general is not allowed to contract for the carriage of the mail in a private way ; the act of Congress makes it his duty to offer the contract to public competition, by advertising for sealed proposals ; the reasons for which requirement, though not stated in the act, are exceedingly obvious. It tends to destroy favoritism in the bestowal of these great money contracts, by obliging the officer to accept the lowest proposals, or to stand responsible, upon the most weighty reasons, to the government and the public for rejecting them ; it affords an equal opportunity to every citizen who thinks he can transport the mail on terms beneficial to the public, to offer his services ; it is the best source of information for the officer and enables him to procure the services at the lowest expense of public money. A law thus equal towards the citizens, forming a check on favoritism and corruption in office, and tending to economy in the disbursements of a great department in the government, was worthy of the wisdom of congress ; and a court of law can countenance no contract which tends to circumvent or subvert its policy. It did seem to me on first thoughts, without time for much reflection during the trial, or for any examination of books, that a restraint on the freedom of men to propose or not, for such a contract, was inconsistent with the freedom of the citizen, who must be at liberty to do therein as he pleases. On further consideration, I am still

Sept. 1828.

Gutick

Bailey.

in favor of that freedom; the great objection to the contract is, that it would restrain the plaintiffs from doing as they might wish, and forcing them not to propose, while every body else was free to do so. The contract imposes on them a restraint from which nothing can set them free, if it be not a legal nullity. The act of congress is built on the freedom of men to propose or not, and a contract in direct restraint of that freedom, necessarily counteracts its policy. We find that the plaintiffs went to Washington, intending to propose for the carriage of the mail on this route, and would have done so agreeably to the policy of the act, if this contract had not interfered with that policy. And I am prepared to think, that it went to the utmost extent, in counteracting the policy of the act and the interest of the department. If there had been twenty applications for this contract, a combination between two, binding only one of them not to propose, would have left nineteen in the field of competition; whereas, here were only two applicants, and this restraint on one of them destroyed the whole of that competition which it was the policy of the law to excite and encourage. If the secret had been kept a few hours longer, the defendants would have obtained an entire monopoly, and the department would have paid \$1500 more than the service was worth, one thousand of which would have been sunk in this illegal contract. A clearer case of the repugnance of a contract to public policy, can hardly be imagined, when it undergoes a deliberate examination. Now, it is an immutable principle, that a contract contrary to public policy is void. *Comy. on Contr.* 26. Thus if a statute prohibit the smuggling of goods, and a contract be made between two persons for carrying it on, one of whom afterwards refuses, or goes on and takes all the profits to himself, he may keep them all, for the law will never enforce the contract against him; *Ibid* 38. So if two or more persons combine not to bid against each other at an auction, it is a contract tending injuriously to affect the value of sales at auction, and therefore is void as against public policy. Thus in the case of *Doolin v. Ward*, 6 *Johns.* 105, the parties being both anxious to purchase certain goods at auction, agreed not to bid against each other, but that Doolin should bid and divide the profits equally with Ward; he bid off the goods; and the clear profits amounting to \$108. Ward sought to enforce this contract at law, but the court re-

Sept. 1828.

Gulick

v.
Bailey.

fused upon the ground of its tending injuriously to affect the value of sales at auction, and being against public policy it was a void contract. The case of *Wilbur v. Howe*, 8 Johns. 444, is to the same effect. It was argued that there is no similarity between a bidding at auction, and a proposal or bidding for the carriage of the mail, because the post-master general is not bound to give the contract to the lowest proposal, but might reject them all together if he deemed them all to be too high. It is still an auction, with limitations or conditions, which are neither unlawful or unusual, if made public before the sale; thus the owner of goods may give notice, that they will not be considered as set up under a certain sum; or he may reserve a right of bidding once on them himself. 1 Com. on Con. 257. *Coup. 396, Beawell v. Christie*. These conditions do not at all destroy the auction which remains a bidding or proposing subject to these conditions, by way of competition as much as if the modifications did not exist. It was also argued from a case in *Cro. Ja. 612, Parker v. Brown*, that as withdrawing from competition for the office of under sheriff, was holden to be a lawful consideration for a contract; so withdrawing from competition for a contract to carry the mail, cannot be considered as unlawful; whereas, it is the policy of the law to encourage competition in one case, while it is indifferent to it in the other. It is no fraud, either on the sheriff or the public, to restrain a person from being an applicant for the office of under sheriff, because public policy is not interested in competition in that case, as it is this and in sales by auction. For these reasons, I am of opinion, that no action will lie on this contract, and that there ought to have been a nonsuit. This renders it unnecessary to enquire in the second place, whether the plaintiffs did not, by the nature of their measures, and advice, virtually and substantially procure other persons to propose for the conveyance of the mail on this route, who but for such measures and advice would not have done it. My impressions from the evidence, at the time of the trial, and even now, would lead me to submit this point again to the consideration of a jury. Let there be a new trial.

DRAKE, J. The consideration of the contract declared on in this case is objected to as insufficient, and against public policy.

Sept. 1828.

Gulick
v
Bailey.

And, in the first place, I am strongly inclined to consider it insufficient. The post-master general, agreeably to the act of congress, had advertised for offers to carry the United States' mail, and was ready to accept the lowest offers made by a certain time. The parties were attending at Washington, with the view to bid, when they entered into this contract, the consideration of which is, that the plaintiffs should forbear to offer themselves, or procure others to offer, to the post-master general, to carry the United States' mail on the route between New-York and Philadelphia. Now, what is it that was yielded by the plaintiffs? no property, nor services, no vested interest of any kind. A right of bidding to be sure; but had that right any inherent value? Nobody can say that it had. It must not be supposed to have been worth one thousand dollars. That was not agreed to be given for the right of bidding. Had that been exercised, it is probable it would have proved to be worth nothing. Had both these parties bid, that one thousand dollars, and probably more, would have remained, not with the plaintiffs, but in the public treasury. Nothing was parted with but a bare possibility of making a speculation. The parties found themselves so circumstanced, that by an agreement, they were enabled to take from the pocket of a third party, and put into that of the defendants, a large sum of money, to which neither of them had previously any title. It cannot well be said that the plaintiffs were prejudiced, by losing what they never had; and although the defendants may have been benefitted, yet it was not by the property or services of the plaintiffs. This case differs from those in 4 *East* 190, 5 *Term Reports* 118, and others to be found in the books, where a person by assiduity, skill and integrity, in the exercise of a trade or profession, has procured a valuable business, and which he may reasonably expect to retain by the same means. Here is a power of acquiring property fairly obtained, the fruits of which ripen into maturity and enjoyment in the ordinary course of events, to relinquish which, is a prejudice to the party abandoning, and an almost certain benefit to him who is expected to succeed to the business. And as respects the public, they may possibly be injured, and possibly benefitted. At any rate, the injury to the public, is too trifling and too uncertain, to require any interference with bargains of this kind; and there

Sept 1828.

Den.

Vanness.

being a positive prejudice to one party, and benefit to the other, the consideration is considered sufficient.

But whatever I might conclude, as to the sufficiency of this consideration, if the contract were entirely harmless, I am decidedly of opinion, that it is illegal, being contrary to public policy. "A contract to do that which is injurious to the community, is void by the common law." 2 *Wilson* 350. Now this contract is to pay the sum of \$1000 to the plaintiffs, upon condition that they will abstain from doing an act, which shall enable the defendants to make that sum, or more, out of the community; that is, to prejudice the public to that amount, or more. The gain to the defendants, by this contract, added to the \$1000, is the precise measure of the injury to the public. An injury directly contemplated by the contract, and forming the consideration for it, if it have any. It is not necessary, in this case, to argue, that danger to the public interests is to be apprehended from this species of contract; the contract itself contemplates that injury, and ascertains the amount when it fixes the value of the contract; or rather, it points out the sum below, which, in the opinion of all the parties, the loss to the public cannot fall.

Let the rule to shew cause be made absolute.

JOHN DEN *ex dem.* JOHN BURHANS *against* SIMON Y. VANNES.

A mortgagor will not be permitted to dispute a title derived under his mortgage, nor allege any thing in opposition to a claim founded on it. Nor can he set up an outstanding title in another, for the purpose of defeating a recovery in an action of ejectment, upon the mortgage.

Though the lessor of the plaintiff, as the assignee of the mortgagee, and as purchaser of the equity of redemption, unite both the legal and equitable title in himself, no such merger will be thereby produced as to prevent him from maintaining ejectment against the mortgagor.

If the lease, in a declaration of ejectment, is stated to have been made on the 7th of July 1825, to hold from "*the 6th day of July then last past*," it shall be construed to mean the 6th day of July 1825, and not the 6th day of July 1824, which was prior to the accrual of the plaintiffs title; for where the words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted rather than that which would destroy it.

HORNBLOWER and *Vanarsdale*, for plaintiff.

Freelinghuysen and *Dickerson*, for defendant.

Sept 1828.

 Dan
v.
Vanness.

EWING, C. J. The lessor of the plaintiff claims the premises in question, by virtue of a mortgage in fee simple upon the said premises, dated 23d February 1818, from Cornelius Van Gieson, Adrian Van Gieson, and the defendant Simon Y. Vanness, to Adam Boyd, to secure the payment, on the first of May 1818, of a bond from them to him, of the same date, for \$500; an assignment of the said bond and mortgage, to the lessor of the plaintiff, by the said Adam Boyd, on the 3d day of May 1825; and also by virtue of two deeds, each for one moiety of the premises in question, with other lands, the one dated on the 27th and recorded on the 29th April 1825, from the said Cornelius Van Gieson, to the lessor of the plaintiff, and the other from Adrian Van Gieson, to him, dated on the 27th of April, but actually executed on the 28th of May 1825.

The defendant rests his defence upon a deed of conveyance, for the premises in question, with other lands, made by the sheriff of the county of Bergen, to Margaret Mead, dated 11th July 1825, upon a sale on the 28th May 1825, by virtue of an execution of *feri facias, de bonis et terris*, returned to January term 1817, of the Court of Common Pleas of that county, levied on the premises in question, with other lands, and issued upon a judgment signed on the 16th January 1817, in favor of the said Simon Y. Vanness, against the said Cornelius Van Gieson and Adrian Van Gieson, and assigned among other things by the said Simon Y. Vanness, to the said Margaret Mead, on the 2d of August 1822.

The fairness and validity of the mortgage in the hands of Adam Boyd; its due assignment to the lessor of the plaintiff, and the default of payment of the money mentioned in it, are not made the subjects of controversy. It is clear, nor indeed did it seem on the argument to be disputed, that the plaintiff is entitled to recover upon the mortgage, unless the grounds of defence submitted on the part of the defendant may legally prevail against it.

1. In the first place, it is said that at the execution of the mortgage, Vanness had no estate in the premises. By the mortgage, he professes to convey, and thereby avers, that he held an estate in fee simple. An ancient rule of the common law, founded on clear and immutable principles of justice, forbids a party from alleging in contradiction of his own deed, or in opposition to a claim founded on such deed, that he was guilty of falsehood,

Sept. 1828.

Den
v
Vanness.

and had no estate or interest in the premises at the execution of the deed.

In *Rawlyn's case*, 4 Co. 53, it was resolved that a lease, by indenture, made by one Cartwright, when he had nothing in the premise demised, was, notwithstanding, good against him by conclusion. In *Smith v. Stapleton*, *Plowd.* 434, *Plowden* arguing for the plaintiff, for whom judgment was afterwards given, said, "inasmuch as the lease is by indenture, both parties are concluded to say the contrary, but that the lessor had the land in possession to pass, and that it passed in possession according to the tenor of the lease." In *Palmer v. Elkins*, 2 Lord Raymond, 1551, the same point is decided; and in *Co. Lit.* 476, the same doctrine is taught. In *Jackson v. Bull*, 1 John. Cases 90, Crabb did not get his deed until January 1776, but made deeds in the October and November preceding. The court said, he could never be permitted to claim in opposition to his deeds, by alleging that he had then no estate in the premises. In *Jackson v. Murray*, 12 John. 204, the court said, "if the plaintiff can recover, it must be on the principle, that when Russell conveyed to Beach, Danforth had not then conveyed to them; but Russell cannot be allowed to say, that his deed to Beach conveyed no interest." In *Lessee of Cooper v. Galbreath*, 3 Wash. Rep. 549, Justice Washington states, it is a principle, an element of the law, that a man cannot recover in ejectment, nor defend himself against his own covenant or grant. "He is stopped by his own act from saying that his title was defective, when his deed professes to pass a good title." In *Den v. Brewer*, *Coxe* 172, a defendant was held to be precluded from controverting the title of the plaintiff, by a recital in a mortgage he had made.

This principle is established and supported by a multitude of other cases both ancient and modern.

The class of cases, which prove that a tenant may shew that the title of his landlord, claiming in ejectment, had expired after the demise, and before the commencement of the suit, have manifestly no analogy to the case before us. The distinction is so obvious as to require no illustration.

It results then, that between these parties, and in this case, the mortgage conclusively proves, that the defendant had an estate in the premises, and removes this obstacle out of the way of the plaintiff.

2. In the second place it is contended, on the part of the defendant, that the mortgage is defeated and rendered unavailable to the plaintiff, because the legal title to the premises has passed to, and become vested in, Margaret Mead, by the sale and conveyance of the sheriff, under the judgment obtained, and execution levied prior to the mortgage. But it is clear, that in this case, and between these parties, the defendant cannot avail himself of the effect and operation, whatever it may be, of that conveyance. The principle which answers the first objection yields its full force against this objection also.

Sept 1828.

Don
v.
Vanness.

Again. The defendant in respect to the assignee of this mortgage, stands on no more tenable ground than a mortgagor or a tenant of a mortgagor, who cannot give in evidence the title of a first mortgage, to bar the recovery of a second; and upon the principle that he is precluded from averring contrary to his own act, that he had nothing in the land, when he took upon him to convey by the second mortgage. *Buller N. P.* 110. The very same principle forbids Vanness from alleging, in this case, that when he made the mortgage, there was a judgment whereby his title might be incumbered or defeated. Moreover, Margaret Mead is not a party defendant in this cause; nor is it shewn, that Vanness is a tenant under her; nor that he holds under her; nor that he came into possession under her; nor that he has attorned or attempted to attorn to her; nor that she had ever recognized him as holding possession for or under her; nor that there is any privity or the slightest connexion between them. Without then at all, questioning the general rule that a defendant may set up an outstanding title, or enquiring into its qualifications and limitations, it is clear that this defendant, a mortgagor, cannot, as against his own mortgage, avail himself of the title of Margaret Mead, who is not shewn to have authorised him in any way to make use of it, and towards whom, for aught we have any right to know, the plaintiff when he seeks to enforce her claims may submit himself. In *Doe v. Pegge*, 1 T. R. 758, Lord Mansfield laid down a sound and incontrovertible rule, entirely just in itself, and pointedly applicable to the case before us. "I found this point settled before I came into this court, that the court never suffers a mortgagor, to set up the title of a third person against his mortgage; for he made the mortgage,

Sept. 1890

Den
v
Vanness.

and it does not lie in his mouth to say so, though such third person might have a right to recover possession."

3. Another ground of defence is, that the plaintiff cannot sustain a recovery on the mortgage in this case, because having obtained the legal estate in the premises, by the assignment of the mortgage, and the equity of redemption or equitable estate, by the deeds from Cornelius Van Gieson and Adrian Van Gieson, he has united in himself the legal and equitable estates and a merger has taken place. Assuming the position that a merger has occurred, upon the soundness of which I think it not necessary to pause to enquire, let us examine the consequences. What is merged? The legal, or the equitable estate? The books cited by the counsel of the defendant, and all other of the few cases which are to be found on this head, say the equitable estate is merged. Now if by being merged, the estate so merged, is, as was insisted by the defendant's counsel, extinguished and annihilated, it is seen that it is the equitable estate whose power, efficacy, existence has ceased. The legal estate by which the other is absorbed is not destroyed, nor even weakened by the addition, but remains available to all legitimate purposes; and in the hands of the present plaintiff, an engine of recovery equally against the present defendant as antecedent to the accession; for it would be an extraordinary result, if the plaintiff holding the mortgage might recover, but adding the equitable to the legal estate should thereby be defeated. The truth however, is, that the terms extinguished, annihilated, are not perhaps the most happily chosen; and serve, without caution, to convey ideas somewhat inapt and inaccurate. They are indeed, sometimes used by high authority and, as intended, are doubtless correct. To some purposes when a merger occurs, both estates are extinguished or annihilated. The distinct separate existence of each is forever gone, nor can be by any possibility revived. The chemist may combine the elements of nature, exhibit them under a new form, and then by his mighty art, reproduce the original elements; but the owner who has merged two legal estates, or an equitable and legal, although he may create new estates, can never reproduce or revivify the old. The true idea of merger consists in a thorough coalescence, an indissoluble union of the merging estates; each still retaining its rights and advantages, or perhaps more properly speaking, each imparting to the

Sept. 1822.

Dea
Vanness.

whole its peculiar attributes. If lands were conveyed to A. for life, with remainder to B. for life, and remainder to C. in fee, and C. should, living A. acquire the estate of B. could he be disabled from recovering at the decease of A. ? Might another person take possession and hold against him during the life of B. ? Would not this consequence necessarily follow, if the estate of B. were, in the popular sense, annihilated ?

From this view of the subject, from a proper understanding of the doctrine and nature of merger ; from the consideration that an union or coalescence, not a destruction of rights is thereby effected ; it clearly appears in my opinion, that the mortgage or legal estate in the present case, in the hands of the lessor of the plaintiff, is by the conveyance to him of the equitable estate, deprived of no part of its efficacy, in entitling him to recover against the present defendant the mortgagor.

Upon the argument, some very important questions were raised and discussed in reference to the title of Margaret Mead. In the view I take of the case, it is unnecessary to examine or decide them ; and it is well that we are not obliged to decide upon her rights in a case where she is not a party, nor, as far as we know, represented or defended before us.

Another objection to the recovery of the plaintiff, founded on the time of the demise, remains to be considered. The lease in the declaration, is stated to have been made on the 7th day of July 1825, to hold from the 6th day of July then last past. The 6th day of July then last past, it is insisted, is the 6th day of July of the year 1824 ; and the plaintiff cannot therefore recover, because the commencement of the lease is prior to the accrual of the title of his lessor. This difficulty is readily dispelled by referring, as may be done, without any violation of either the sense or the grammar, and in perfect accordance with both ; the words then last past, to the whole member of the sentence, the 6th day of July, instead of either the month or the day exclusively. Correctly taken, it is neither the month, July, nor the day, the 6th, separately to which the reference is made, but both united. This will the more clearly appear by enquiring when last past ? The answer is not in July 1825, but on the 7th day of July 1825 ; and consequently, the day as well as the month, must be regarded. The 6th day of July then last past, is the 6th day of July 1825, and thus, properly understood, the objection loses all its force.

Sept. 1828.

Dea
v
Vanness.

Upon the whole, I am of opinion, the plaintiff is entitled to recover.

FORD, J. The plaintiff, in ejectment, laid his demise on the 7th day of July 1824, to hold from the 6th day of July then last past, and this was construed by the defendant to mean *July then last past*, that is July 1823, which was prior to the accrual of the plaintiff's title, and therefore the defendant moved for a nonsuit. But if this reference is taken to the *day last past*, the month and year will remain right, and it is not an universal rule that relatives, or relative words, shall refer to the nearest antecedent; instances to the contrary occur in the best of authors, as "the fruit of that forbidden tree whose mortal taste," &c. If it may be understood either way, that one which renders this fictitious demise useful to the action should be adopted, rather than that which would destroy it. But, if this be otherwise, there is still no ground for a nonsuit, because the *interest* under a lease commences, both as to the title and mesne profits, from the time of *making it*; *Adams* 189, and the *habendum* may retrospect to any time, for the mere purpose of computation, as so many years from a certain nativity, feast, or even eclipse; thus if a lease be *made* in 1828, to hold from the year 1800 for 35 years, it is by *computation* a lease in interest for only 7 years. *Bac. Ab. Leases, L.* and the cases there cited. If the lessor had title at the time he made the lease, it would be valid from that time till the expiration of the term.

But the principal question was, whether Burhans had any title to the premises. He claimed under a conveyance from Cornelius, and Adrian Van Gieson, whose title to the premises, and whose deed to Burhans, as far as they had power to make it, were both admitted; but there was a judgment against them, (before they conveyed to Burhans) in favor of *Simon Y. Vanness*; under which judgment their property was afterward taken in execution and sold and conveyed by the sheriff to Margaret Mead, as purchaser, which sale avoids any conveyance that it is ordinarily the power of the debtors to make. On the other hand the *lien* of this judgment was denied for several reasons; *first*, that it was discharged of record before Burhans purchased; *secondly*, that it was fraudulent as against creditors and *bona fide* purchasers, and therefore void under the statute; *thirdly*,

that Simon Vanness assented to the sale to Burhans, and was to look to the purchase money in the hands of the Van Giesons for satisfaction of his judgment; and his suing out execution after such sale was a fraud.

Sept. 1828.

Den
t.
Vanness

First. The judgment in question was confessed in October 1816, and execution immediately levied on the land; it then lay dormant five years, till the 13th October 1821, when satisfaction was entered of record in the following words: "I do hereby acknowledge, that the plaintiff has received full satisfaction of the debt and costs mentioned in this judgment. Dated 13th October 1821, *J. A. Boyd*, attorney for plaintiff." And it was three years and a half after this entry of satisfaction, that Burhans purchased of the defendants, in that suit, to wit, by deed of the 25th of April 1825. Several exceptions were then taken to the validity of this discharge, and the first was, that no payment of the debt had been proved. But these judgments would inflict double terror on purchasers if the plaintiff's acknowledgment on record was not sufficient evidence of satisfaction, as between him and strangers. The next exception was, that while Simon Y. Vanness was living in the Genessee country, and absent from the state, John A. Boyd made this acknowledgment as his attorney without any authority for so doing. But the law authorises these acknowledgments to be made *by attorney*; and if one acts as such on record without authority, the principal has an undoubted remedy against him for the damages. On the other hand it might be impossible for a third person to prove this power between attorney and client, if one actually existed. But I think there was evidence-enough in this case, both direct and circumstantial; for after this acknowledgment had been entered of record, when Simon Vanness was about to take the benefit of the act, he represented it to Mr. Vanhouten as a *receipted judgment*, and thereby recognized it himself as being discharged. It is also certain that he had notice of this discharge as far back as 1822, and yet made no complaint to the court against it or against Mr. Boyd, but suffered it to remain in full and undisputed validity for four or five years. It is a record of the Court of Common Pleas, and being neither vacated nor set aside by them, I think we are bound to treat it as verity, and to receive no averment against it. But supposing the judgment not satisfied of record, the plaintiff insists,

Sept 1828.

Dep
r.
Vanness.

Secondly. That it was fraudulent as against creditors and *bona fide* purchasers, and therefore void under the statute. The Van Giesons being indebted to sundry persons in more money than they were able to pay, gave a bond and judgment to their brother-in-law, Simon Y. Vanness, for the large sum of \$7000, without its appearing that they were indebted to him at the time, or for money lent or advanced, or upon any balance of accounts. The parties, at the time of confessing the judgment, declared that the intent and purpose of it was to prevent them from being harrassed by their creditors. When one of those creditors threatened to impeach it in the Court of Chancery, as being voluntary and fraudulent, Simon Y. Vanness virtually admitted the charge, by expressing his belief that it would be set aside for that cause; and by way of preventing such a catastrophe, and in order to quiet that creditor, he actually advanced some money and assisted the Van Giesons to pay that debt; but these advances were not to half the amount of the judgment. It was argued that a judgment might be lawfully confessed as security for such moneys as might be afterwards advanced; but no such condition was annexed to this judgment; it was on the face of it for an absolute debt, and it was so represented to creditors, expressly for the purpose of delaying and hindering them. These circumstances would have led any honest jury to conclude that it was fraudulent. If such a judgment is not fraudulent the statute of frauds might as well be repealed. It is however valid as between the parties to it, and as against all the world except creditors and *bona fide* purchasers. It becomes therefore an important question, whether Burhans was a *bona fide* purchaser; for if he appears to be such, this fraudulent judgment cannot be set up against him. The Van Giesons have parted with their title, and the question lies solely between Burhans and Vanness, whether the latter can enforce the judgment against him. The case shews that Burhans knew of this judgment at the time of purchase; but he also knew, that Vanness gave nothing for it, that it was merely intended to delay creditors, and though nothing was given for it at the time (which appears to have been either no secret or one badly kept) yet that Vanness had advanced some moneys subsequently to the confession, and as he held the judgment at his disposal, it was proper to confer with him about the purchase. He had power to sell the property himself, or to

Sept. 1828.

Den
v
Yanness.

relinquish the lien, such as it was, and allow the Van Giesons to sell it themselves. If he actually consented to their selling of the property to Burhans for a fair and full consideration, he shall not set up this covenous judgment to beguile and defraud a fair purchaser. Now that he recognised the right of the Van Giesons to sell the property, and complained of them for not doing so, is very apparent. While he and Adrian Van Gieson were in the Lake country, they complained that *Cornelius did not sell*; this is testified by Simon's son. They also complained of Marselis Van Gieson (who seems to have been the friend and agent of the whole concern) for not selling the land. To gratify their urgent desires, Marselis applied to Burhans to purchase it, and told him, that they had authorised him to sell. A negotiation immediately commenced about a price, and after going several times between Cornelius and Burhans, it was fixed at \$50 an acre. Simon Y. Vanness was then consulted about the price, and he returned for answer, that Cornelius must do as he pleased. After the bargain was completed he ratified it, and advised them to give Burhans possession according to the contract. Such is the testimony of Marselis Van Gieson the kindred, the relative, and it may not be too much to add, the agent of all persons, on that side of the bargain. The sale being thus effected, the money in part paid, the rest secured by articles and deeds delivered, Simon and Cornelius began to fall out about dividing the consideration money between them; Simon wanted a few dollars more than Cornelius was willing to allow him, and a dispute ensued, on which Simon said he would resort back to his judgment for his money. Accordingly he caused the land to be sold by the sheriff, upon that old and dormant execution; and Margaret Mead, his sister, who appears to be only the *nominal* assignee of the judgment, became the purchaser of the estate for \$15; but Simon had the controul of it, his was the interest, he was to get the money from Burhans if he could only get enough of it, and he was the person who had it sold on execution. Now the plaintiff, in a voluntary and fraudulent judgment, cannot use it to set aside a fair sale to a third person, negotiated and ratified by his own procurement and consent, for a fair and full consideration. It would allow him to defraud a *bona fide* purchaser by means of a covenous and fraudulent judgment, and thus overthrow the very intent of the statute of frauds.

Sept. 1823.

Den
r
Vanness.

Upon each of these grounds I think the lien of the judgment was dissolved.

But Burhans had another claim to the premises, independently of all that goes before, as the assignee of a mortgage, in which Simon Y. Vanness was one of the mortgagors; and so long as a mortgage remains unpaid, the mortgagor shall never be allowed to deny the title. An assignee, by taking an assignment, is allowed to keep the mortgage on foot, for his protection. The doctrine of merger cannot therefore apply to it. Nor would it mend the defendant's case either way. If Burhans has a title, under the Van Gieson deeds, he is entitled to recover the lands; and if he has no title under their conveyances he has no estate in which the mortgage can merge, and therefore it remains a title of itself. In every view of the case it appears to me that the plaintiff is entitled to recover.

DRAKE, J. The lessor of the plaintiff derives title to the premises in question, under deeds of conveyance, from Adrian Van Gieson and Cornelius Van Gieson, who were once the undisputed owners of the same. But the Van Giesons had previously confessed a judgment to the defendant, upon which an execution had been sued out, and the property sold to one Margaret Mead, under whose title the defendant seeks to protect his possession.

Besides opposing several serious objections to this title, the plaintiff further shews, that yet earlier than the entry of the said judgment, the Van Giesons, together with the defendant, executed a mortgage upon the same premises to one Adam Boyd, to secure the payment of a considerable sum of money; which mortgage had since been assigned, for a valuable consideration, to the lessor of the plaintiff. And he contends, upon well established principles, that Vanness, the defendant, having executed this mortgage, should not be permitted to gainsay the title derived under it. To get clear of this obvious consequence, it is insisted, for the defendant, that Burhans, the lessor of the plaintiff, having previously purchased the equity of redemption, of the Van Giesons, this mortgage title united with and became merged in it, the moment it was assigned to him by Boyd. Questions involving the doctrine of merger arise between persons who have separate, but consistent, interests or estates in the subject of the

Sept. 1923.

Dea
v.
Vannow.

claim, if there be no extinction or merger of one of these interests or estates in the other, as, between the executor and heir, to whom it is important to ascertain whether an inferior, or chattel, interest is extinguished : between heirs in the *paternal* and *maternal* lines : and between devisees of *realty* and of *personalty*. In this case, if, after the mortgage, and equity of redemption, had united in Burhans, his real estate by will, or otherwise, had passed to one person, and his personal estate to another, this question of merger would properly have arisen. But I see not how a stranger is to enquire into it. The whole title becoming united does not weaken, or destroy, the efficacy which any of its component parts had as against strangers.

But in the present case, there is another reason why the defendant cannot avail himself of this doctrine. He claims title under a judgment, and sheriff's sale. There was a title passed by that sale, or there was not. If there was not, the plaintiff is entitled to recover by virtue of the title derived under the deeds from the Van Giesons. If there was, if the equity of redemption was passed to Margaret Mead, it did not remain in the Van Giesons, and consequently was not conveyed by them to Burhans. And if not conveyed to Burhans, his mortgage title could not sink and merge in it. It therefore exists, and is sufficient to enable the plaintiff to recover.

Judgment for plaintiff.

Sept. 1823.

Richman
v.
Richman.ADMINISTRATORS OF THOMAS RICHMAN *against* DANIEL RICH-
MAN, EXECUTOR OF DAVID RICHMAN.

IN DEBT.

The statute of limitations begins to run, and is to be computed only from the time of payment, and not from the date of the bond.*

If in an action of debt on a bond, with a penalty to secure the payment of money only, the defendant pleads payment, and gives notice of set off, and any part of the debt has been paid, it is proper for the jury to specify, by their verdict, the exact balance due the plaintiff, although the judgment must be rendered for the penalty.

THIS action was brought to recover the penalty of a bond, dated March 29, 1799, conditioned for the payment of £100, in ten annual instalments of ten pounds each; the first payable on the first day of June 1800. The condition of the said bond is in the words following, viz. "The condition of this obligation is such, that if the above bound David Richman, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above named Thomas Richman, his executors, administrators, or assigns, the full sum of one hundred pounds of lawful money of this state; the payments to be as follows: That on the first day of June one thousand eight hundred, the said David Richman is to pay ten pounds with lawful interest, and so to continue the payments for ten years, ten pounds yearly, with the lawful interest of that sum yearly, then this obligation to be void, or otherwise to be and remain in full force and virtue."

The defendant pleaded. 1. *Non est factum*. 2. That the action did not accrue within sixteen years. And 3. Payment with notice of set off.

The jury found a verdict for the plaintiffs, and assessed the damages at \$533.

A rule to shew cause why the verdict should not be set aside, was granted.

* NOTE. In the case of *Thorpe v. Coombe, & Dowling, and Ryland's, Rep.* 347, where a promissory note was made payable "two years after demand," it was held that the statute of limitations, did not begin to run, until the two years after demand had elapsed.

Dayton, for the plaintiff, argued against the rule.

Jeffers, for the defendant.

Sep. 1822.

Richman
v.
Richman.

EWING, C. J. The reasons assigned by the counsel of the defendant, for setting aside the verdict in this case are, that it is 1st. Against law. 2dly. Against evidence. And 3dly. Against the charge of the judge.

1. Against the law of the case. The action was brought by process returnable to the term of May 1822, on a bond dated March 29th 1799, conditioned for the payment of £100, in ten annual instalments, of £10 each, with interest, the first of which was to be paid on the first day of June 1800.

One of the pleas was, that the cause of action of the plaintiffs did not accrue within sixteen years next before the commencement of the suit: upon which issue was joined: and on this issue, the verdict was found for the plaintiffs.

The first payment mentioned in the condition of the bond, was to have been made on the first of June 1800; the others in the succeeding years; and the last on the first day of June 1809, and consequently, the times when four instalments fell due, are within the period of sixteen years prior to the suing out of the writ.

If then, any cause of action on this bond, accrued within this period of sixteen years, the verdict on this bond is right.

The defendant's counsel contends, and in this, the error of the verdict in point of law consists, as he alleges, that the time mentioned in the statute of limitations begins to run, and is to be computed from the date of the bond and not from the times of payment.

This position is entirely unsound; the converse of the proposition is settled law; the period mentioned in the statute is to be counted from the time of payment, and not from the making of the promise. *Preckle v. Moor*—1 Ventr. 191; *Anonymous* 1 Mod. 89; *Sawkill v. Warman*, 10 Mod. 104; *Gould v. Johnson*, 2 Lord Raymond 838; S. C. 2 Salk. 422; *Topham v. Braddick*, 1 Taunt. 571; *Holmes v. Kerrison*, 2 Taunt. 323; *Fenton v. Emblers*, 1 W. B. 353; S. C. 3 Burr. 1281. In the former book, Lord Mansfield is reported to have said: "The statute proceeds upon the presumption of laches which

Sept. 1828.

Richman
v.
Richman.

can never happen until after the contingency is determined ;” and in the latter report more explicitly. “ No one can doubt, but that the bar only takes place from the time when the right accrued, and not from the time of making the promise.” In *Wittersheim v. Carlisle*, 1 H. B. 635, the court speaking of a contract for the repayment of money at a specified time say, “ until that contract was broken, there was no cause of action.” If it be said, the cases to which I have referred arose on simple contracts and not on bonds or specialties, the reason is obvious, because in England no statute of limitations exists as to bonds ; and the answer is plain and satisfactory, the principle applies with equal propriety and force to a bond, as to a promissory note, or other simple contract. *Constructio ad principia refertur rei*. Another answer is afforded by our statute of limitations. It speaks of the condition of the obligation for the payment of money, and refers the period of time not to its date, but to the accrual of the cause of action. Indeed, the construction might almost deserve to be called absurd, which would make the time of limitation, which as *Lord Mansfield* said, proceeds on the idea of laches, to commence before the day, when the creditor could demand his money, and to be running while he is necessarily compelled to stand still.

It follows then, that the plaintiffs in this case did shew, that a cause of action accrued within 16 years, and the verdict on this head is right. But it is said the statute had run against some of the instalments, as they were older than the term of sixteen years. This remark has no place in the consideration of this head, for if so, as some of the instalments were within the term of sixteen years, there was notwithstanding a cause of action on the bond. The remark properly relates, and so far as the state of the case will enable us, is to be examined under the next reason assigned, to which I now proceed.

2. The verdict is against evidence. Here it is to be premised, that every reasonable presumption should be made in favor of the verdict ; that the party complaining, is bound to make its error manifest ; and that we are in our investigation to look for the facts to the transcript and postea and state of the case only ; and by the state of the case, I mean to include those matters which are made part of it by proper references, and are exhibited to the court. The claim of the plaintiff was, as already men-

Sept. 1828.

Richman
v.
Richman.

tioned, upon a bond. The defendant claimed a set off for moneys paid to the use of the plaintiff's testator, and also alleged a settlement between them to have taken place ; in proof of which he produced an instrument of writing. This paper it was alleged, on the other side, had been altered in a material part ; and of this alteration some evidence, to say the least, was given ; the question of alteration was properly before the jury and without intending to insinuate any opinion as to the fact of alteration, there is no ground to believe that the verdict is against the evidence. The jury found there was due to the plaintiffs 533 dollars. As to the form of verdict in specifying a sum, it is proper to remark, that our statute directs that where a defendant has pleaded payment and given notice of set off, if upon trial a bond with a penalty to secure the payment of money only, shall be given in evidence for the plaintiff or defendant, the sum *bona fide*, and in equity due, and not the penalty shall be deemed and taken to be the debt due ; and if it shall appear that any part of the debt or sum demanded, has been paid or satisfied, then such part shall operate as a payment ; and so far extinguish the said debt or sum, and the jury shall set off or discount so much as has been paid or satisfied, and find a verdict for the amount of the residue or balance ; but if the action has been brought on a bond or obligation for the payment of money, and the plaintiff shall recover, judgment shall be entered for the penalty of the bond or obligation, to be discharged by the payment of the sum found by the verdict, with interest and costs, where costs ought to be awarded. Hence it was proper in this case, I speak merely of the form of the verdict at present, for the jury to find the sum due the plaintiff ; and such course this court sanctioned in the case of *Smock v. Warford*, 1 *South* 306. With respect to the sum in the present case found by the jury, and its propriety and consistency with the evidence, we are unable to make a close or minute scrutiny. We have not the materials to make out a calculation and thus test the accuracy of the verdict. It appears from the state of the case that certain receipts were read in evidence to support the claim of set off ; and some allowance must unquestionably have been made on account of them ; but neither in the state of the case, nor by any documents produced before us, nor even in the written arguments of the counsel of the parties, are we furnish-

Sept. 1828.

Richman.

Richman

ed with either dates or sums. If indeed no legal view of the fact, so far as they are disclosed to us, can lead to such a result as the jury has obtained, the verdict ought not to stand. But if without contravening any fact before us, such an amount might, on legal principles, be found, we are bound to presume it in the absence of any evidence to the contrary, and the verdict therefore can not be disturbed. Our statute of limitations directing suits on obligations for the payment of money, to be commenced within sixteen years next after the cause of action shall have accrued, has this farther provision: "If any payment shall have been made, on any such specialty, within or after the said period of 16 years, then an action instituted on such specialty, within 16 years after such payment, shall be good and effectual in law." Bearing this rule in mind, there is no difficulty in making a calculation and statement, which shall produce 533 dollars remaining due at the time of the trial, without violating any precept of the statute of limitations. Whether the dates and sums of this calculation would correspond with those contained in the receipts, I am unable to say, for, as already remarked, the dates and sums have not been stated to us. It is clear they would not be contradicted by any fact exhibited to us. And this consideration is enough for the present, for before we are at liberty to set aside this verdict, we are required clearly to shew and distinctly to prove that it is inconsistent with the evidence.

It would be a source of deep regret, if we should not have been able to attain or decide the real merits of the controversy between these parties for want of a more full state of the case. It, however, ought to be observed that the paper before us was not drawn up by the judge, who tried the cause, but by the counsel of the defendant; and knowing his care and circumspection, may we not fairly suppose he has made the most of his case?

I am not, therefore, satisfied that this verdict is against evidence.

3. The third reason is, that the verdict is against the charge of the court. The charge is not contained in the state of the case, and has not been in any way laid before us. This reason therefore, is not sustained. In the brief of the defendant's counsel, by way of reply, two positions are mentioned which we may not pass unexamined. He says, there "is a plea of payment, and after 20 years it is sufficient to plead payment and rest on the

Sept. 1828.

Brinkerhoof

v.
Doremus.

presumption; for no action can be maintained on a bond after 20 years." The presumption, however, was always liable to be overcome by circumstances, and especially by proof of payments. But the vague and uncertain rule of the English courts, founded on a presumption of satisfaction, after a lapse of 20 years, is in this state supplied by a plain rule prescribed by act of the legislature, a definite period of sixteen years. No resort therefore, can be had to the doctrine of presumption. Nor, indeed, needs there be, for the statute will raise a bar before the presumption could operate.

The other position is, that the defendant was surprised on the trial, by an objection made to the date of the paper, containing the alleged settlement, which a new trial will enable him to explain; of this surprise there is no verification, and we are not at liberty therefore to give it consideration.

Let the rule to shew cause be discharged.

DRAKE, J. declined giving an opinion, stating that the cause had been submitted to the court on written arguments, copies of which had accidentally been prevented from reaching him before the present term.

ADRIAN BRINKERHOOF *against* ALBERT G. DOREMUS AND OTHERS.

IN DEBT.

A bond in the following words: "We A. B. C. D. and E. F. are held and firmly bound unto G. H. in the sum of seven hundred dollars, to be paid to the said G. H. or to their or either of their heirs, executors, administrators, or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, severally by these presents," is a *several* bond, and not *joint and several*.

This case was submitted to the court on written arguments.

Vanarsdale and *Hornblower*, for plaintiff, cited 1 *Saund.* 153, *a. Shep. Touch.* 375. *Bac. Abr. Title Obligation, D. 4. 2. Blck. Com.* 381. 298 *Hard.* 94.

Frettinghuyen, for defendant, and in support of the demurrer, cited 5 *Co. Rep.* 23, *a. Cro. Eliz.* 493, 470, 548, 5 *Co. Rep.* 19, *a. 5 Com. Dig.* 123 *Obligation, H. D. O. Dyer* 350. *Cro. Eliz.* 379.

Sept 1828.

Brinkerhoof
v.
Doremus.

EWING, C. J. The declaration, in this action, is upon a bond in the usual form; Albert G. Doremus, one of the defendants, after oyer, has demurred. The penal part of the bond is in the following words: "Know all men that we, Elizabeth Vanwinkle, John V. D. L. Brinkerhoof, Gabriel Genung, Peter Jackson, Albert Doremus, Benjamin Van D. L. Brinkerhoof, and Peter Schuyler Brinkerhoof, are held and firmly bound unto Adrian Brinkerhoof, in the penal sum of seven hundred dollars, to be paid to the said Adrian Brinkerhoof, or to their or either of their heirs, executors, administrators, or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, severally by these presents. Sealed with our seals, and dated the twelfth day of August in the year of our Lord one thousand eight hundred and sixteen."

This obligation as the defendant insists is several, but as the plaintiff alleges is joint or joint and several.

The penal part of a bond contains several clauses, each of which has its appropriate office; thus to express the person or persons to be bound, the name of the obligee or obligees, the sum, the date, the appropriation of the seals, and in the clause next preceding the latter, when the instrument is skilfully drawn, we find the manner in which the obligors, if more than one, are bound for the payment of the money. In this clause then, the nature of the present bond should in the first place be sought; we find there a mode of expression simple, precise, and clear of difficulty. "Which payment well and truly to be made, we bind ourselves, our executors, and administrators, severally by these presents." And that such is truly the meaning of the parties, will be clearly evinced by stripping off those words which have no necessary operation on this question, though highly useful for other purposes. It would then read thus, "We E. V. W. et cetera are bound unto A. B. in the sum of 700 dollars to be paid to the said A. B. for which payment we bind ourselves severally." An instrument of this kind is oftentimes unskilfully drawn, and may, and frequently does, express the manner in which the parties are bound in some other than the appropriate clause. Wherever found, its just effect should be yielded to it; for the leading rule is to ascertain the meaning of the parties, and so to understand the instrument and give it operation, if thereby no known principle of law is violated.

The counsel of the plaintiff insists that there is a repugnancy between the leading clauses of the bond, "We are held and firmly bound," making, he says, a joint obligation, and "we bind ourselves severally," indicating, he admits, a separation. Hence both clauses are to stand, and the bond is joint and several, or the latter is to be rejected, and the bond be deemed joint. But there is no such inconsistency. The words, we are held and firmly bound, if no more be said, would as the plaintiff's counsel justly assert, make a joint obligation; but, if more be said, these words always take their complexion from what is added to them. To be held and firmly bound, is as truly and aptly predicated of those who are bound severally, as of those who are bound jointly. When then these persons say they are bound, and afterwards, before the sentence is finished, declare the manner in which they are bound, the paramount rule of construction, that every word is to have its just effect, and that each part if possible is to be reconciled with every other, removes all difficulty out of the way of our enquiry.

In *Wigmore v. Wells*, 3 Leon 206, Moor 260, an obligation in these words, "we bind ourselves and every of us jointly," was held to be a joint obligation, for the word every is expounded by the word jointly.

In *Matthewson's Case*, 5 Co. 23, a charter party had been made between the master and owner of a ship, of the one part, and seven merchants of the other part, against one of whom this action was brought. The master and owner covenant with the merchants to transport certain merchandise, and the merchants covenant severally with the master and owner, that one merchant shall pay £3, and another £3, and so of the rest. The words are, they covenant severally, et cetera; and in the end, in the clause, and to the performance of all and singular the covenants, on the part of the aforesaid merchants to be performed, each of the merchants severally binds himself to the aforesaid master and owner in double the freight.

It was resolved, that although the merchants join in covenant, yet the word severally, makes it a several and not a joint covenant. Also, the latter clause is, in law several, by reason of the same word, and this word shall be referred to the several covenants before. And, farther, that when the covenants are several,

Sept. 1828.

Brinkerhoof
v.
Doremus

Sept. 1828.

Brinkerhoof

v.
Doremus.

they are as several deeds written on one and the same piece of parchment.

The plaintiff's counsel in their brief, in allusion to this case remark, that the rules of construction for contracts, on which actions of covenant are brought, are peculiar, and do not apply to actions of debt upon bonds with penalties. The difference is not pointed out, nor the authority for the remark, either in precedent or principle given to us; and so far as relates to the present enquiry, I am unable to feel the force of the suggestion. The purpose is to attain the true meaning of the particular modes of expression; and whether these are found in one or another species of instrument cannot, I apprehend, vary the result. The same answer cannot, however, be given to the *case of the inhabitants of the township of Middletown, in the county of Monmouth v. M^cCormick and another.* Penn. 500. The bond was in these words: "Know all men by these presents, that we D. M. T. M. and C. D. are held and firmly bound unto the inhabitants of the township of Middletown, in their corporate capacity, in the sum of one thousand dollars each, to be paid, et cetera." This court was of opinion, not that there was a repugnancy between the words; nor that because we are held and firmly bound, was found in one clause and, each, in another the bond was to be deemed joint and several; nor that the latter clause, each, was to be rejected, and the bond held joint; but that the bond was, on the only construction which could be given to the words, several in its nature.

In the present case I am of opinion the bond is several; the demurrer is well taken and judgment should be rendered for the defendant.

Drake, J. said, that although the reading of the penal part of the bond did not entirely satisfy him as to its true construction, he was relieved from all doubt by the decisive expression of the meaning of the parties, to be found in the condition; and he concurred in the opinion that it is a several bond.

Judgment for the defendant.

JOHN JEFFERY *against* ADAM WOOLEY.

Sept. 1838.

Jeffery

v.

Wooley.

CERTIORARI.

A foreign attachment can issue only for a cause of action founded on contract, and of such a nature as to enable the plaintiff, as of course, to require special bail.

In some causes of action founded on covenant, an attachment will lie, and in others not, because in some, the defendant may, and in others he may not be held to bail as of course.

When an attachment, founded on covenant, issues out of the Court of Common Pleas, and is afterwards removed by *certiorari* into the Supreme Court, the jurisdiction of the Common Pleas, must be shewn, and will not be presumed; and unless the affidavit shews that the cause of action was such as to enable the plaintiff to require special bail, without a judges order, the proceedings in attachment will be quashed.

WALL, for plaintiff in *Certiorari*.

Ryall, for defendant.

EWING, C. J. In this case, a writ of attachment pending in the Court of Common Pleas, of the county of Monmouth, and the proceedings thereon, which had so far progressed, that the defendant was twice called, and his second default had been recorded, were removed into this court. And John Jeffery, the defendant in attachment, has moved to quash the writ and proceedings, because an attachment will not lie in the case exhibited by the return to the *certiorari*.

The writ of attachment is "of a plea of breach of covenant." In the affidavit, Adam Wooley, the plaintiff swears, "that John Jeffery his debtor, is not to his knowledge or belief, resident at this time in this state, and that the said John Jeffery owes to this deponent, the sum of three hundred dollars damages he hath sustained by reason of the breach of covenant, which the said John Jeffery made to this deponent hath broken."

The remedy by attachment, is founded in this state upon statute, and we are therefore to recur to the statute, to ascertain in what cases, or under what circumstances, this remedy may be made use of and applied. An attachment will lie where the cause of action is founded upon contract, and is of such a nature, that the plaintiff is entitled to hold the defendant to bail, upon filing an affidavit of the cause of action. When the cause of action arises *ex delicto*, or, being upon contract, is of such a

Sept. 1898.

Jeffery

v.

Wooley.

nature that bail cannot be required without the order of a court or judge, resort cannot be had to this remedy. A demand may be founded on a contract, but the amount to be recovered, so uncertain and unliquidated as to require the intervention of a jury; and as in such case, the opinion of the plaintiff would not be the measure of damages, nor his oath suffice of itself to fix the amount of bail, so neither can he, upon such demand, sue out a writ of attachment. A review of the statute, will fully warrant these conclusions. The general scope of it leads to them almost irresistibly. Its details admit no other construction. The title is, an act for the relief of creditors, against absconding and absent debtors. Two classes of debtors are contemplated throughout the act, 1st such as having resided in the state, have absconded from their creditors; and, secondly, such as are indebted, and have property here, but reside in some other state or country; and the provisions of the statutes are in some respects common to both, in others, necessarily distinct. The first sections provides the attachment against the former class, and enacts that "if any creditor shall make oath or affirmation, that he verily believes that his debtor absconds from his creditors, and is not to his knowledge or belief, resident in the state at the time," the clerk shall issue an attachment against the estate "of such debtor." The 26th section provides against the second class; after by preamble, reciting that debtors, who reside out of this state, may have property in the same, sufficient to pay their debts, or some part thereof, it enacts, that the property "of every debtor, who may reside out of this state" shall be liable to be attached and proceeded against "for the payment of his debts," in like manner, as nearly as may be, as the property of other debtors are made liable by that act, and prescribes that the applicant for the attachment shall, in such case, make oath of the non-residence of the person against whose estate the attachment is to be issued, "and that he owes to the plaintiff, a certain sum of money, specifying as nearly as he can, the amount of the debt or balance." The fifteenth section provides, that the court on the return of the writ, shall appoint persons "to audit and adjust the demands of the plaintiff, and of so many of the defendant's creditors as shall have applied for that purpose," and "to ascertain the sum due to the plaintiff, and to each of the creditors aforesaid," and throughout the whole statute, when-

Sept. 1828.

Jeffery
+
Woolley.

over the parties are spoken of, unless called plaintiff and defendant, they are uniformly styled creditor and debtor. The 21st section directs a sale of the property "attached and taken as aforesaid, or such part thereof, as shall be necessary to satisfy the debts of the plaintiff and the creditors, who may have applied agreeably to the directions of this act." And the 22d section directs the auditors to distribute the money arising from the sales "among the said plaintiff and creditors, equally, and in a ratable proportion, according to the quantum or amount of their respective *debts*, as ascertained by the said report, and the judgment thereon." The counsel of the plaintiff, in order to give a more extended construction to the statute, singled out some phrases which of themselves might mark wider bounds. But such phrases, whenever they occur, are necessarily to be understood in reference to and connection with, and where doubtful are to be explained by, other terms or clauses of the act. And, in truth, almost every phrase he cited, is coupled with some other which inevitably limits its generality. Thus, the demands in the 15th section, are the demands of creditors. So in the 27th section, the words "jointly bound or indebted," are said to be in the disjunctive; but before the sentence is finished, those, thus jointly bound or indebted, are called "joint debtors," and the estate attached, whether separate or joint, is to be sold for the payment "of such joint debt." The supplement of 1820 does not, as justly observed, expressly require the published notice to state any thing of the cause of action, but it directs the notice to be given, when an attachment has issued "against any *debtor or debtors*, who may reside out of this state." And precisely the same remark is applicable to the other instances mentioned by him. The general scope, and the particular details of the statute, more fully establish the position that the cause of action must be founded on contract. So are the terms, debt, debtor and creditor, to be understood; nor is a straitened or rigid construction to be adopted, being forbidden no less by the liberality due to a remedial law, than that which is expressly enjoined in this statute, "for the advancement of justice and the benefit of creditors."

▲ similar view of the matter, proves the position, that the cause of action is to be of such a nature, as to entitle the plaintiff to require bail in ordinary actions, upon filing an affidavit of

Sept. 1828.

Jeffery
v.
Wooley.

the amount due and the cause of action. The plaintiff or his agent, is to make affidavit, that the defendant is his debtor; and in case of a foreign attachment, he is to make oath that he owes him, and, as nearly as may be, is to specify the amount of the debt or balance. But a conclusive argument on this point is drawn from the provision that the defendant is permitted to appear and defend the action, only by entering into special bail. He is not authorised, in some cases, to enter a common appearance or file a common bail; and in others to give special bail, but in all places is required to give special bail. A plain proof that the writ is to be used only in cases where special bail is in general required; and as no order of a court or judge is, even when an appearance is proposed, to determine the propriety requiring bail or to fix its amount, it follows that the attachment is not to be issued in those cases where the propriety of bail, or its amount is to be ascertained by such order. So great a departure from the ordinary rules and principles in respect to bail, as to authorise a plaintiff to enforce bail in all cases, and in all at his pleasure to fix the amount, is not to be admitted without plain legislative enactment. In the case of *Peacock v. Wildes*, 3 Halst. 178, Justice Ford, who sat alone in the cause, decided that an attachment would not lie against an heir for a debt of his ancestor, because an heir is not liable to be held to special bail when sued for such debt.

Having thus shewn that the cause of action must be founded on contract, and of such nature as to enable the plaintiff, as of course, to require special bail, we are prepared to approach more closely the present case. The action is of a plea of covenant broken, founded therefore upon contract. The nature of the covenant is not disclosed by the affidavit or any part of the proceedings returned into this court. The general rule in respect to bail is, that where the cause of action arises from a debt or money demands, or where it sounds in damages, but the damages may be ascertained with certainty, the defendant may be held to bail as of course. But when the cause of action sounds merely in damages and those damages are unliquidated, or cannot possibly be reduced to any degree of certainty, without the intervention of a jury, the defendant shall not be held to bail, unless an order of a judge be first obtained for the purpose. In particular, in the action of the covenant, the defendant

Sept. 1828.

Jeffery
v.
Weoley.

cannot be held to bail as of course, unless the covenant be for the payment of a sum certain. 1 *Arch. Pr.* 51. 1 *Sallon Pr.* 43. *Tidds Pr.* 150, 151. *Rinton v. Hughes*, 6 *D. and E.* 13. *Willey v. Thornton*, 2 *East* 409. In this form of action, then a defendant in some cases may, and in others may not be held to bail as of course, according to the nature of the contract; and hence it appears in some causes of action, founded on covenant, an attachment will lie. The argument of the counsel in support of the present attachment, then is, that as an attachment may issue for some demands in covenant, this writ should be sustained, as this court will not presume the Court of Common Pleas have acted where they have no jurisdiction. In other words, inasmuch as there are cases in which the attachment may be used, the court are bound to presume the present to be one of them. But this reasoning is not sound. In the first place, a fact is assumed as the basis of it, of which we find no proof. In what have the Common Pleas acted? They have not rendered judgment. Entries of the first and second default are not acts on which this presumption can be built. Secondly. The jurisdiction by attachment is limited, not general. Hence the jurisdiction must be shewn, not presumed. As the writ may be used in some cases only, the affidavit which is most strictly required to be filed before the writ is issued, and as the authority of the clerk to seal it, should shew that it is sued out in one of them. If such be not the rule, how is a party to be relieved against a writ improvidently issued? On the return of the writ, when, by its execution, his property is bound, and if goods and chattles, perhaps already in the hands of the officer, if he applies to the court, is he to be told the plaintiff may possibly be right, and you must therefore shew what is his cause of action or remain unredressed? If the defendant would appear in order to resist the demand of the plaintiff, is he to put in special bail in the dark? Is he to give bail and afterwards to find by the declaration, not only that the amount has been fixed by the caprice or the anger or malice of the plaintiff, and that bail would not only be not required as of course, but that a judge's order for it could not have been obtained? The sound rule forbidding such presumption as the plaintiff asks, and requiring him to express in covenant the nature of his action, obviates those difficulties.

In as much then, as it does not appear that the plaintiff is en-

Sept. 1828.

Debow
v.
Titus.

titled to this remedy ; or that the court had jurisdiction to proceed by writ of attachment. I am of opinion the writ and proceedings in the present case should be quashed.

PAUL DEBOW *against* GEORGE W. COLFAX AND ANDREW TITUS.

If A. as minister of a certain church, is entitled to the possession of the parsonage land, and while in possession, sows the land with grain, then sells the growing crop to B. and voluntarily ceases to be minister of that church, leaves the parsonage land, and removes to another congregation before the crop is harvested, B. has not such a title to the crop, as to enable him to maintain trover against a person who takes it away. A disclaimer, by the consistory of the church of all title to the crop in question, is not evidence to support the title of B.

He who has an estate, in lands, the duration of which is uncertain in point of time, and he who has such an estate as may perhaps continue until the grain be ripe, shall, if he sows the land, be permitted to enter upon it at harvest, and reap the crop, although in the mean time his estate may have ended either by the act of God, or of the law. But if the estate is between seed time and harvest, determined by the act of the tenant, the growing crop passes with the land, to him who thereupon becomes the immediate owner of the latter.

To maintain trover, the plaintiff must prove property in the article for which the action is brought.

GIFFORD, for plaintiff.

Frelinghuysen, for defendant.

EWING, C. J. Upon the trial of the cause, at the Bergen Circuit, in October 1824, before the late *Chief Justice*, a nonsuit was ordered, which the plaintiff now seeks to set aside.

From circumstances satisfactorily explained, on the argument at the bar, and not necessary to be farther adverted to, the facts as they occurred at the trial, are not exhibited to us in the usual manner. The documents laid before us, and the statements and admissions of the respective counsel, however, present in substance the following case. The congregation of the Dutch church at Pompton plains, are the owners of a tract of land called the parsonage land, of which, the title is vested in the trustees, chosen according to the usages of that church and agreeably to the act of the Legislature. This parsonage land was pro-

Sept. 1828.

Debow
v.
Tilley.

vided and designed for the use of the minister of that church, and to aid in his support, and was accordingly occupied by the incumbent for the time being. In the year 1815, the Rev. Mr. Field was the minister, and in the fall of that year he sowed part of the land with rye. Early in the spring of 1816 he sold the rye, in the ground, to one Romer, who afterwards sold it to the plaintiff. Antecedent to the 1st of May 1816, but after the sale, Mr. Field of his own act, and voluntarily, withdrew from the ministerial service, and ceased to be the minister of that church, left the parsonage land and removed to another congregation and place of residence. The rye was harvested by the defendants. The present action in trover was brought against them, and went to trial upon the plea of not guilty; and the *Chief Justice*, being of opinion that the plaintiff had not shewn property in the rye, directed a nonsuit.

In examining the propriety of the nonsuit, the first question to be resolved is, whether Mr. Field would himself have been entitled to cut and carry away the grain at maturity had no sale by him been made? At the time he sowed the grain, he was the minister, in possession, and entitled to hold and enjoy the parsonage so long as he remained minister. The precise nature or apt denomination of the estate which he had in the premises, whether of freehold, or for years, or at will, needs not to be sought. For the law of emblements, so far as may be necessary for the determination of this point will equally apply, whatever may be its name or nature. He who has an estate or interest in lands, the duration of which is uncertain in point of time, and he who has such an estate as may perhaps continue until the grain be ripe, shall, if he sows the land, be permitted, or his executors or administrators, in case of his decease, to enter upon it at harvest and reap the crop, although in the mean time his estate may have ended, either by the act of God or of the Law. But if the estate is between seed time and harvest, determined by the act of the tenant, the growing crop passes with the land, to him who thereupon becomes the immediate owner of the latter. *Shep. Touch. 451. Co. Lit. 55.* This is where a woman held an estate in lands during her widowhood, which is technically denominated an estate for life, because it may last so long, and sowed the land and before severance married, the crop was adjudged to belong to the landlord of whom she held, and

Sept. 1928.

Debow
v
Titus.

not to her or her husband. *Oland's Case*, 5 Co. 116. So if tenant for life commits wastes and thereby incurs a forfeiture, or if he surrenders his estate, or if tenant at will himself determines his will and refuses to occupy the ground; in these and similar cases, he loses the emblements. *Cro. Eliz.* 461. *Co. Lit.* 55, a. 2 *Bl. Com.* 123, 145. To apply these principles: Mr. Field, when he sowed, had an estate which might have continued until the ensuing harvest. But in the mean time, by his own voluntary act, he put an end to the estate. He ceased then to be the owner of the growing crop, and could not have reaped it had no sale been made.

The enquiry results then, in the second place, what is the effect of that sale? Does it vest in the purchaser a greater right than would have remained in the seller, Mr. Field? Shall the former hold, and may he take the crop, although as we have seen, the latter might not. The counsel of the plaintiff sought to maintain the affirmative, and relied on the rule which gives to the undertenants or lessees of tenants for life, greater indulgences than their lessors, the tenants for life; as in the case of a woman who holds *durante viduitate sua*, if she leases her estate to an undertenant who sows the land and she then marries, her act shall not deprive him of the emblements. This doctrine is sound; yet it appears not to have been without question at one time, for *Lord Coke*, in his report of *Oland's Case*, says expressly, the lessee of the widow shall not have the emblements, and the reason assigned is, that he shall not be, as to the first lessor, in a better condition than his own lessor was. But *Croke* in his report of the same case by the name of *Oland v. Burdwick*, *Cro. Eliz.* 461, states the opinion of the court to have been, that the lessee should have the emblements. The doctrine reported by *Croke* has been followed by *Blackstone*, and the writers and judges of modern times, and may now be considered as the correct and settled rule. But this rule always assumes the fact that the grain has been sown by the undertenant or lessee, and not by the tenant for life.

I have found no adjudged case, nor even a *dictum*, which gives the underlessee the crop where the grain has been sown, not by him but by his lessor. And just reason and sound principle would forbid such extension of the rule. Its foundation is due encouragement to husbandry, and the security of him who

Sept. 1828.

Debow
v.
Titus.

labors and sows from the effect of the acts of another not under his control. But the rule would be worthless from obvious liability to evasion, if the widow might the hour before her marriage, or the tenant on the day antecedent to his commission of waste, avoid the consequence of those acts by so simple a device as the sale of the crop. So far as we meet with any thing in the books, this distinction is recognized. In the case of *Grantham v. Hawley*, Hob. 132, it is said, if a man conveys an estate, which he has sowed, to A. for life, and A. dies before the crop is severed, the person who sowed it shall have it; and on the margin it is said, if the lessor sow it, and then convey the land to A. for life, remainder to B. for life, and remainder to C. and both die, the lessor shall have the crop that he sowed. Now it is clear in these cases, that if A. and not the grantor, had sowed the grain, his executor or administrator would have taken the crop. Hence a difference in the rule, from the person by whom the grain has been sown, is clearly evinced. In the case before us then, Mr. Field having sowed the crop could not vest in Romer an higher or greater right over it than he himself held; and if by his act he has defeated any just expectation of the vendee, from him and not from these defendants should redress be sought.

On these considerations I am of opinion the nonsuit was rightly ordered.

As another reason for setting aside the nonsuit, the counsel of the plaintiff insisted that the cause should have been put to the jury upon the facts. I think otherwise. Upon the facts exhibited in evidence on the part of the plaintiff he had not shewn, in matter of law, property in himself in the rye in question, an indispensable pillar of his action. If the cause had been submitted to the jury, the duty of the judge would have been to have charged them, that the plaintiff taking the facts to be true, had failed to shew a right to recover, and was not entitled to their verdict. A plaintiff may not ask a jury for a verdict, and the judge may well prevent by a nonsuit, a verdict mistakenly rendered, and which afterwards must be set aside, if, on the plaintiff's own case, uncontroverted as to fact, the law is clearly against him. Moreover, from the affidavits laid before us, it appears the plaintiff's counsel, and wisely too, preferred a nonsuit; for after the opinion of the judge, as to the legal effect of the voluntary removal of Mr.

Sept 1828.

Debow
v.
Titus.

Field, had been expressed, the counsel of the plaintiff said : "if that is the opinion of the court, the plaintiff must submit to a nonsuit, and he was accordingly nonsuited." I remark wisely, for he has thereby secured to his client, the plaintiff, review of the legal questions here, and an opportunity if the opinion of this court should be against him, to make out in another action, a better case in point of fact, if fact will warrant it.

Another reason for setting aside the nonsuit is, that legal evidence offered by the plaintiff was overruled. In the course of the trial he offered to read to the jury a resolution of the consistory of the church, adopted on the 29th November 1817, to the following effect : "that this body disavows any claim to the grain mentioned in the resolution of the 4th of May 1816, and declare that said resolution was passed in anticipation of an expected purchase, which has never been realized." The resolve of the 4th of May 1816 was, that "Paul Debow take particular care of the grain on the parsonage lot, lying in Bergen county, and that he shall be satisfied for his trouble." The evidence of the resolve, of November 1817, because it amounted at the most, only to a disclaimer on the part of the church, but vested no title in the plaintiff, was overruled. And in my opinion, rightly. The question depended on the title or property of the plaintiff in the rye. If he legally acquired none, under the purchase by Romer from Mr. Field, he had none, nor could any mere disavowal or disclaimer on the part of the consistory supply, or tend to supply the want. A very different case might have been presented, if a valid act on the part of the corporation, made in due season, and antecedent to the harvest, transferring to Paul Debow their property in the rye, had been produced. But as was justly remarked by the judge, it was no more, in its most liberal acceptation, than a disavowal on their part, not a transfer ; and if indeed a transfer of what avail to establish a legal title in the plaintiff, could have been their transfer of a chose in action in November 1817, upwards of a year after the rye had been cut, and in the possession of the defendants ?

An undue weight seemed on the argument at the bar, to be attributed to the fact that an action for the taking of the rye had been commenced in a Justice's Court, to which these defendants had filed a plea of title. The plaintiff however in this court accepted, without objection, the plea of not guilty, and went to

trial upon it. The title of the defendants or of the church, or of any other person than the plaintiff was not therefore the subject of enquiry, until he had shewn in himself a title *prima facie* valid in law and fact.

Sept 1828.

Snook
v.
Sutton.

Let the nonsuit stand.

WILLIAM C. SNOOK *ex dem.* JOHN C. COURSEN AND WILLIAM
COURSEN *against* LEWIS SUTTON AND OTHERS.

EJECTMENT.

A lease made by the guardian of an infant under the age of fourteen years, for a term of years extending beyond the arrival of the infant at that age is voidable, and may be avoided by another guardian chosen by the infant after he attains the age of fourteen.

RYERSON, for plaintiff.

Job S. Halsted, for defendant.

EWING, C. J. The single question, on which this cause depends, is whether a lease made by the guardian of an infant under the age of 14 years, for a term of years extending beyond the arrival of the infant at that age, is afterwards valid or voidable. For it was candidly and correctly admitted by the defendant's counsel on the argument that, if not valid but voidable, enough had been done to avoid the lease, on which alone the defence on the trial of this cause rested.

Matthias Cummins was, on the 23d of February 1816, appointed guardian of John and William Coursen, the lessors of the plaintiff, until they should attain the age of 14 years. The former became 14 in December 1822, the latter arrived at that age in July 1825. On the 23d of May 1826, William Snook, the plaintiff, was legally appointed their guardian until the age of twenty-one. Matthias Cummins, on the 29th June 1824, made the lease in question for a term of five years, to expire on the 1st of April 1830.

The case of *Vandoren v. Everitt*, 2 South. 460; strongly relied on by the counsel of the defendant, so far from proving that

Sept. 1828.

Snook
v
Sutton.

a guardian of an infant under fourteen, may make a lease, which shall continue unavoidable beyond his guardianship, and until the infant becomes twenty-one years of age, does, rightly understood, clearly sustain the converse of the proposition. In that case the lease was made by a guardian over 14, for a term which was to end on the 1st of April 1815, about eight months after the infant would attain majority in July 1814. And the question was whether, after that time, it was [absolutely] void or [merely] voidable. What was said by the court is to be taken, as at all times it ought, with reference to the existing state of facts. *Ch. J. Kirkpatrick* said, "If guardian in socage make a lease to continue beyond his guardianship, it is not absolutely void upon the infant coming of age, but voidable only. And consequently, the infant may, at that time, either affirm the lease or void it at his pleasure." *Justice Russell* said, "The lease from the guardian, who had the sole charge of the estate of his wards, was certainly good, until those wards or one of them should arrive at full age: whether it should be so to the remainder of the term, depended on him who was entitled to the estate. Should he receive rent after he came of age, it would be a recognition of the lease, and he shall be bound by it. From the interest and authority which the policy of the law hath invested guardians with, a guardian may do several acts which will bind the infant, such as making leases."

Now, it is clear, that any generality of expression to be found in these opinions, is to be referred to and limited by the very case, at that time, before the court. This subject of which they were speaking was not a lease made under 14 to continue until 21, but a lease made after 14 to continue beyond 21. They meant to say a guardian over 14, might make a lease, not void as had been insisted by the counsel of one of the parties, but which should continue until the ward arrived at majority and even longer if affirmed by him, when of full age. They did not intend to say a guardian under 14 might make a lease, which should remain unavoidable until 21. Of such a lease, they had no occasion directly to speak. They do, however, distinctly recognize a general principle; and it is in truth, the principle established by the case, that a lease made by a guardian, extending beyond the period of guardianship is voidable by him who is then entitled to the charge, control and management of the estate.

Sept. 1828.

Snook
v.
Sutton.

Notwithstanding the influence to which this decision is justly entitled, it may be satisfactory to look somewhat further into the subject.

To our guardian by statute, the guardian in socage, or guardian by the common law, as he is sometimes called, is most nearly assimilated. They are by no means *alter et idem*; in some points they entirely differ. But the one is probably the source of the other, and the resemblance between them will sustain an analogy sufficient for our present purpose.

The guardian in socage is the next of kin of the heir under the age of fourteen, to whom the lands of inheritance cannot possibly descend. He has the custody of the person and the lands of the heir, until he attains the age of fourteen years. When arrived at that age, or at any time afterwards, the infant may choose another guardian. The guardianship in socage regularly ceases when the heir becomes fourteen, though if he chooses no other guardian, the former continues until he becomes of the age of 21 years. *Bacon* says, the guardian in socage is invested by law not only with an authority, but an interest in the lands of the ward; but he always adds "till the guardianship ceases." *Bac. abr. tit. Guardian, A. fol. 674. tit. Leases 406, 407.* Now, as the authority and interest end when the guardianship ceases, it seems to follow as a necessary conclusion that the guardian cannot make a lease which shall outlast, in full force, both his authority and interest. But let us pursue this enquiry further. *Littleton*, whose authority on this point is unquestionable, says, in section 123, "When the heir cometh to the age of fourteen years complete, he may enter and oust the guardian in socage, and occupy the land himself if he will." Now this doctrine is utterly irreconcilable with the position, that the guardian may make a lease which shall be valid, and bind the infant himself, as well as every other person until 21. For if he may enter and oust the guardian and occupy the land, he may surely do the like, if a lease has been made by the guardian, who can not lawfully invest another with a greater interest than he himself holds. The doctrine of *Littleton*, has ever since been uniformly recognized. In *Byrns v. Van Horses*, 5 *John.* 66, the Supreme Court of New-York say, "This guardianship [in socage] ceases when the infant arrives at the age of 14, so far as to entitle the infant to enter and take the land to himself, and yet if no other guar-

Sept. 1898.

Snook
v
Sutton.

dian succeeds this will continue." *Ch. Just. Reeve* in his treatise on domestic relations 313, says, "At fourteen, the ward is no longer under such guardian [in socage.] He may then demand his estate and have an account from the guardian. He may enter upon the guardian and oust him, but being still a minor, he may be under a guardian of a different description.

The principle so plainly deducible from this control of the infant over the lands, when he becomes fourteen, is further illustrated and enforced by the qualification of the power of the guardian in socage in making leases, which is so uniformly and unvariably annexed, whenever the power is mentioned. *Comyns tit. Guardian B. 4*, says, "He may make a lease of the infant's estate, till his age of fourteen years. In *Wade v. Baker*, 1 *Ld. Raym.* 131, the court say, "Guardian in socage, may make a lease of lands in his own name until the age of fourteen." In the *King v. Oakley*, 10 *East* 494, *Lord Ellenburgh* said, "a guardian in socage may dispose of it during his guardianship, though accountable afterwards to the heir;" and *J. Gross* said, "she had a right during her guardianship, either to lease or occupy the estate." In *Ross v. Gill*, 1 *Wash.* 90, the court said, "there is no doubt but that a guardian may lease the lands of the ward, during infancy if the guardianship so long continue. In *Field v. Schieffelin*, 7 *John. Ch. Rep.* 184, *Chancellor Kent* said, "the guardian in socage of the real estate, may lease it in his own name and dispose of it during the guardianship, and the Chancery guardian has equal authority.

The phrase respecting time in all these cases, is clearly designed to indicate the legal duration or continuance of the lease, which the guardian may make, and not to denote the time at which it may be made. It was not intended to say, he might make it being guardian, and not before he became or after he ceased to be so. But to shew what period of time he might lawfully comprehend in his lease.

I have said that the guardian in socage, might continue to act as guardian after the infant arrived at the age of fourteen, unless superseded by the choice of another. It is important to notice, that in this respect, our statute law as it stood, when *Matthias Cummins* was appointed guardian of the lessors of the plaintiff was radically different. A guardian of an infant under 14, was appointed to be guardian until he should attain the age of 14.

Sept. 1828.

Snoek
v.
Setten.

At that period, the guardianship ceased by its own limitation. If the minor afterwards chose the same person to continue guardian, an application was made by the minor to the Orphans' Court in person, an entry was made by the clerk on the minutes of the court and endorsed on the letter of guardianship, which was sufficient to constitute a legal guardianship, until the minor should arrive at 21, without a new letter of guardianship, but if the minor chose another person, letters of guardianship should anew issue. *Patt. 63. sec. 18.* Thus the law remained from the year 1784 to 1820, when it was enacted, that the guardian appointed under 14, should be guardian until the orphan attained the age of fourteen, or other guardian should be appointed in his stead, and until the orphan after arriving at the age of fourteen should choose another guardian, the person first appointed should remain under the first letter of guardianship, and the bond thereon given should continue in force, but if the orphan should choose another guardian, a new letter should be issued. *Rev. Laws, 1784, sec. 28.* In the case before us then, a question might well be raised, whether the lease made after Cummins had ceased to be guardian of John C. Coursen, by his attainment of the age of fourteen was not, as to his moiety of premises, entirely void. It is not necessary however to examine it, for the lease being, at the best, voidable, the defendant had no available defence, and judgment ought therefore to be rendered for the plaintiff.

DRAKE, J. The question raised in this case is, how far the guardian of an infant under fourteen years of age can make a valid lease of the infant's lands to continue beyond that period. Guardians in socage, by the common law, continued only until the minor was fourteen years of age; for then he was presumed to have discretion so far as to choose his own guardian. 1 *Blk. Comm.* 462. And during the continuance of the guardianship, he was considered to have not merely a bare authority over the lands descended, but also an interest, which enabled him to make leases in his own name; and if he made leases for years to continue beyond the time of his guardianship, such leases were held not absolutely void by the infant's becoming of age, but only voidable, by him, if he thought fit. 4 *Bac. Abtdgt.* 139. *Southard's Rep.* 460. If becoming of age always means the

Sept. 1828.

Snook
v.
Sutton.

full age of 21, which is very doubtful from the context with which it is frequently connected, the books take but little notice of the avoidance of leases by infants between the ages of fourteen and twenty-one. From which circumstance, as well as for reasons drawn from cases, which certainly sometimes occur, where it would be for the advantage of the estate that a power should exist somewhere to make long leases, it is insisted on the part of the defendant, that this lease was not revocable until the infant had arrived to the age of twenty-one years. But I should not feel inclined, unless upon express and well sealed authority, to coincide in this opinion. The statute of New-Jersey, which was in force at the time when this lease was made, regulating the appointment of guardians to infants under fourteen, evidently contemplated a renewal of the authority after the ward became fourteen, to constitute a legal guardianship until twenty-one. And it would be strange if a guardian for a limited period should be enabled, by force of that appointment, to exercise an authority over the lands of the ward, to continue beyond that period, at the sole pleasure of such guardian, to any time within the limit of seven additional years. The common law, in its ever watchful care of the interest of minors, has suffered their guardians to make *advantageous* leases for them, continuing, at the option of the minor, even beyond the age of twenty-one. And for the same reasons, we may so construe our statute, that if the guardian of an infant under fourteen, make an *advantageous* lease for him to continue beyond that age, it shall not be absolutely void, but the lessee shall be bound by it. This may benefit, but cannot prejudice the infant, if he be left free. But he must be left free, otherwise, his interest will be ever liable to suffer from a selfish, or fraudulent, desire in the guardian to stretch his authority to the utmost, or from his erroneous speculations as to the future value of property. My opinion then is, that the lease under which the defendants claim was at least *voidable*. And as the infant was yet within age, and not able to act in the letting of lands, or revocation of a lease, it was done in this case in the proper mode, that is to say, by his new guardian duly chosen and appointed.

Judgment for plaintiff.

WILLIAM RIBBLE AND ZACHARIAH FLOMMERFELT against WILLIAM JEFFERSON.

Sept. 1898.

Ribble
v.
Jefferson.

IN CERTIORARI.

In an action brought by the payee of an order or bill of exchange against the drawer, the state of demand must substantially aver that notice, in due season, was given to the drawer, of the nonacceptance or nonpayment of the bill or order.

If a promise is conditional, before a recovery can be had upon it, the performance of the condition must be shewn. *Per C. J. Ewing.*

M. CROXALL, attorney for plaintiff.

C. Lewis, attorney for defendant.

EWING, C. J. We are obliged, without investigation of their merits, to dispose of and lay aside the errors of law alleged by the counsel of the plaintiffs in *certiorari*, to have occurred on the hearing of the appeal in the Court of Common Pleas. The case, as it appeared there, is not properly brought before us. We cannot see or know, from the returns and affidavits, what evidence was given, or what questions of law where or might have been raised and decided in that court. The return to the *certiorari*, contains a copy of a rule of the Court of Common Pleas, stating that the parties had failed to agree upon a state of the facts, and the court was unable to settle the same, and directing the clerks to return to this court. Such return being made, this court granted, at the instance of the plaintiffs in *certiorari*, leave to supply a state of the case by affidavits. They were afterwards taken, one by the plaintiffs and two by the defendant. But neither, by them nor in any other manner, did it appear that any part of the matters they contained had been testified or given in evidence before the Court of Common Pleas. Time was given by this court to remedy this defect. And as the papers now stand, one of the witnesses, he who was examined on the part of defendants below, who are plaintiffs here, declares that his affidavit contains what he testified on the trial of the appeal; but although it is admitted there was evidence given in the Common Pleas on the part of the plaintiff there, it is in no manner shewn to us what the evidence was, or whether the matters contained in the other affidavits were testified, nor indeed whether the persons who made them were examined as witnesses, in that court. It is not sufficient for the plaintiff in *certiorari* to rest content with exhibiting what evidence he gave, and hope

Sept. 1823.

Ribble

v.
Jefferson.

for a reversal. The evidence of his adversary may have made out a legal cause of action, and we are bound so to presume until the reverse is established by him who complains. In the case of the *Stata v. Mayhew*, on *certiorari*, 4 *Halst.* 78, this court said, "The decree is presumed right until the contrary is shewn, either from the face of the decree, or by such matter dehors the record as may be the proper subject of examination. The decree stands fully supported by legal intendment, and the party in whose favor it is made, may safely rest on it until its destitution of legal support is shewn by him who makes it the subject of complaint." One of the reasons urged by the plaintiff's counsel for reversal, impeached the sufficiency of the state of demand. If this be well taken it must prevail, for a legal cause of action, proved on the trial, will not sustain the judgment, unless it be substantially shewn in the state of demand.

Jefferson in his state of demand alleges that Ribble and Flommerfelt on the 20th May 1823, this action being commenced on the 17th December 1825, made two separate orders in his favor, the one requiring John Summers, and the other requiring Jacob Summers to pay him a certain sum of money. The orders are set out at length; and which orders "as he avers the said John Summers, esq. and Jacob Summers respectively refused to accept, that is to say, the orders drawn on themselves individually, by which refusal, and a subsequent request by defendants, that plaintiff would keep the orders, and a promise upon that to pay if they would not, that is the said Summers', they have become liable to pay both amounts, with interest, to plaintiff." To enable Jefferson to recover in consequence of the refusal to accept either notice in due season to the drawers of the non acceptance or a legal excuse, for it was necessary, not merely to be proved on the trial, but to be shewn substantially at least in the state of demand, for otherwise he had not, and did not shew a legal cause of action.

Halsey v. Salmon, Penn. 916. *Estell v. Vanderveer*, 2 South. 782. *Disborough v. Vanners*, 3d. *Halst.* 231, are cases of the existence and application of this rule. It is clear then that this state of demand is defective, unless it can stand on the subsequent promise which it alleges. But that promise is conditional, "to pay if they would not, that is, the said Summers'." Now it should have been shewn, and that too by something subsequent

Sept. 1823.

 Ribble
 v.
 Jefferson.

to the promise, not the mere antecedent refusal to accept, that they would not pay. The right of recovery did not rest merely upon the promise, but on a contingency, the event of which ought therefore to have been shewn. *7 Co. 76, Ughtred's Case. Read v. Wilkinson, 2 Wash. Rep. C. C. Rep. 517. Davies v. Smith. 4 Esp. Cases 36.*

The state of demand therefore does not shew a legal cause of action.

- **DRAKE, J.** William Ribble and Zachariah Flommerfelt were sued, as drawers of two several orders, or bills of exchange, which were retained by Jefferson, the payee, and plaintiff below, an improper length of time, without giving any notice of nonacceptance or nonpayment to the drawers. This defect in the plaintiff's case is attempted to be got over by shewing conversations between him and Ribble, one of the defendants below, from which it may perhaps be inferred, that Ribble waved the irregularity with respect to notice, and undertook to pay if the drawees of the several bills did not. Without expressing any opinion how far Ribble might be bound by these conversations, there is certainly no foundation for holding Flommerfelt liable. It does not appear that the defendants below were partners, and after Flommerfelt was discharged by want of notice, he could not be again made liable but by his own consent.

Let the judgment of the Common Pleas be reversed.

Sept. 1828.

THOMAS MARTIN *against* LEWIS THOMPSON AND OTHERS.

Martin
v.
Thompson.

CERTIORARI.

The Statute of November 1820; *Rev. Laws 796*, which gives the Court of Common Pleas power to grant relief, on appeal, both in matters of law as well as matters of fact; means such relief as accords with the nature of another trial, not such as belongs peculiarly to a writ of error. The jurisdiction of the Supreme Court on *certiorari*, was not by that statute transferred to the Court of Common Pleas, nor are the same grounds of reversal to be applied or prevail in the one court as in the other.

The Court of Common Pleas, cannot on appeal reverse the judgment of the justice, because it is not entered according to legal form.

RYERSON, for the plaintiff, in *certiorari*.

FROM, for the defendant.

EWING, C. J. This case comes before us in a manner somewhat irregular. An appeal was made from the court for the trial of small causes, before *Justice Robertson*, to the Common Pleas of the county of Warren. When the hearing of the appeal came on, the following judgment was given, as appears by the return to the *certiorari* now before us. "This appeal being called in its turn, the court after hearing the argument of counsel, reverse the judgment rendered by the justice, with costs to be taxed." From this order it would not be very readily inferred, that the Court of Common Pleas, were of opinion the justice had rendered no judgment, and on that account had ordered the reversal. Among the papers, however, connected with the return is a certificate of one of the judges of the court, setting forth the occurrences at the hearing and presenting a different view of the case; but whether this certificate was made at the hearing or since; whether it is the act of the court or of a single judge; whether done in open court or elsewhere, in no wise appears. Inasmuch, however, as it was referred to on the argument before us by the counsel of both parties we may, perhaps properly, disregarding some irregularity, look into it for explanation of the grounds of the order of the Court of Common Pleas. The judge certifies, that when the trial of the appeal came on, the counsel of the appellee moved to dismiss the appeal, because no judgment had been rendered from which an appeal could lie. But the court refused. The appellee then offered the witnesses examined before the justice, in order to support and establish

Sept. 1828.

Martin
v.
Thompson.

the cause of action set forth in the state of demand. The court refused to hear them ; and on the motion of the appellant, declared null and void the proceedings in the cause before the justice, and ordered the same to be set aside. The counsel of the defendants in *certiorari* insist, that the order of the Court of Common Pleas is legal, because no judgment had been rendered by the justice, the entry on his docket after stating the verdict of the jury, being in these words, " which," referring to the verdict, " I entered accordingly with costs of suit, four dollars and one cent, June 5th 1828" ; because in similar circumstances, this court on *certiorari* have repeatedly set aside the proceedings of justices ; and because the Court of Common Pleas, since the extension of the jurisdiction in cases of appeal, by the act of the November 1820, having power to give relief in matters of law as well as matters of fact, may reverse a judgment on appeal for errors of law apparent upon the transcript. This course of reasoning so far at least, as it applies to the present case, and farther it needs not now be examined, is not sound. The province of this court on *certiorari*, is to review the proceedings of the courts for the trial of small causes, and to set them aside when errors of law are made to appear. And such, prior to the act of 1820, was the only mode of relief where the judgment was founded on the verdict of a jury, as no appeal would there lie. Hence it sometimes occurred, that a judgment entirely just in itself was set aside from some irregularity, apparent on the docket of the justice ; and at others a verdict contrary to the evidence was sustained, because this court could not enquire into that matter. To remedy these topics of complaint, the legislature extended the jurisdiction of appeal to judgments founded on verdicts of juries and reports of referees, forbade in cases where an appeal is given, the removal by *certiorari* of a judgment for the correction of any supposed error therein, and directed that the party thinking himself aggrieved, should have relief upon the appeal only, and, that both as to matter of law and matter of fact. Now the course of procedure on appeal was well known and long practised and established. It was another trial or hearing of the cause, and in the progress thereof, relief was to be given in matters both of law and of fact. But it is erroneous to suppose that the jurisdiction of this court on *certiorari*, was thereby transferred to the Court of Common Pleas ; or that the same grounds of

Sept. 1822.

Martin
v.
Thompson.

reversal were to be applied and to prevail in the one court as in the other, or that relief was to be given in the same way in the Court of Common Pleas, as had formerly been done in this court. When relief was provided in matters of law and fact, it was such relief as accords with the nature of another trial, not such as belongs peculiarly to a writ of error. The ancient course of this court on *certiorari*, was to reverse the judgment, if the justice had not kept his docket in the manner directed by the statute. Yet it was not intended, that such matters should effect the judgment upon an appeal. If an incompetent witness is examined, or illegal evidence is admitted before the justice on *certiorari*, his judgment is simply reversed; but on an appeal a reversal is not to take place, the witness or evidence is to be overruled and the proper judgment rendered upon legal evidence. Another illustration may be made more analogous perhaps to the case before us. In an action against executors, for a cause of action which accrued in the life of the testator, a general judgment was uniformly held to be erroneous and was reversed in this court; but on appeal such relief could not be had. A general reversal of the judgment on that ground could not take place; it would be the duty of the court to "hear the proofs and allegations of the parties," according to the terms and directions of the statute, and to give such judgment as the justice ought to have given.

It is clear then, that in the present case it was not regular for the Court of Common Pleas, merely to inspect the transcript returned to them by the justice, and to reverse or set aside the proceedings, because on *certiorari* the Supreme Court had done the like. It may not be without profit here to remark, that in most of the cases in which such decisions have been made by this court, it appeared that the justice, without rendering judgment, had actually issued execution, which was not done in the case before us; and the reason given by the court in the earlier cases in the reports for setting aside the proceedings, is, that without judgment it was unlawful to issue execution.

If when this appeal was called on for hearing, in the Court of Common Pleas, it appeared to the court that the justice had rendered no judgment, it was the duty of the court to have dismissed the appeal for want of jurisdiction. A judgment was indispensable to give them jurisdiction. The act of the legislature, the only

Sept. 1828.

Davison
v.
Schooley.

support of the appeal, gives it when a judgment has been obtained ; I do not mean to say a formal regular valid judgment. Nevertheless, there must be at least something in the nature of a judgment. Now, in the present case, there either was or was not such a judgment. If there was not, the appeal should have been dismissed. If there was, the court should have proceeded according to the statute, to hear the proofs and allegations of the parties, and should have given such judgment as those proofs and allegations would have required.

In my opinion, the judgment of the Court of Common Pleas is erroneous and should be reversed, and the record and proceedings should be remitted in order that the court may do what has not yet been done, proceed therein agreeably to law. From the remarks already made, I trust it is clearly understood, that I intend merely to say that the order in fact made by the Court of Common Pleas was erroneous. Whether there was or was not a judgment, from which an appeal could be taken, and whether that court will, when the cause is returned to them, dismiss the appeal or proceed to hear the parties, are points for their determination, and ought to go to them unbiassed.

JAMES DAVISON against BENJAMIN SCHOOLEY.

CERTIORARI.

This court will not reverse the judgment of a justice on account of an omission to charge the jury upon a specific proposition, stated by counsel, unless it be made clearly to appear, that the proposition was warranted by the evidence, and necessarily involved in the verdict to be rendered.

Where judgment is rendered for treble costs, it is not necessary to state, first, the amount of the single costs, and then the trebled sum. It is sufficient to state it thus "*\$49 being treble the costs and charges of the plaintiff.*"

HAMILTON, for plaintiff.

J. Ewing, for the defendant.

EWING, C. J. Two reasons were assigned for the reversal of the judgment in this case.

T

Sept. 1828.

Davison
v.
Schooley.

1. The omission of the justice to charge the jury as required by the counsel of the defendant. I shall take the facts in support of this reason from the affidavit read on the part of the defendant below, the plaintiff in *certiorari*. The deponent states, he called upon the justice to charge the jury in the following manner, and to prevent misapprehension on the nature of the charge, reduced the same to writing, and handed it to the justice in the following words, to wit: "that in as much as it appeared from the evidence, that the complainant having mortgaged the premises in question, to the estate of William Chapman, dec. and that in consequence of his being unable to satisfy the same, or even the interest, and had agreed with Isaac Ivins, one of the executors of the said deceased, to give possession, and had removed therefrom early in April, and that said executor had taken possession accordingly, and leased the same to the defendant, that this being so the defendant's possession was lawful, and that their verdict ought to be in his favor:" and that instead of conforming to their request and making such charge to the jury, on the contrary, the justice merely read two sections of the act under which the suit was brought, saying that was the law on the subject, and they would have it before them, and did not make any other charge on the matter.

The justice was not requested to give a general charge upon the law of the case. The affidavit makes no such assertion, nor indeed could it have been permitted, for the justice in answer to a rule taken at the instance of the plaintiff in *certiorari*, explicitly states that no general charge was called for. The counsel, before the justice, stated a specific proposition, and required the justice so to charge. Now it is incontrovertible that this court cannot reverse, on account of the omission of the justice to comply with the requisition, unless it be first made clearly to appear that the proposition was warranted by the evidence, and necessarily involved in the verdict to be rendered; yet no such thing has been made to appear before us, nor has it even been attempted. The legal conclusion contained in the proposition is supposed to flow from certain facts, the mortgage, the agreement to give possession, the removal from the premises, the taking possession by the executor, and the lease to the defendant, all which are stated in the proposition to have appeared in the evidence. It will be admitted that the charge as required, would

Sept. 1828

Davison

Schöoley.

have been improper, and the justice right in refusing it, if those facts had not appeared in the testimony. It will be farther admitted, that the statement of these facts in the proposition submitted to the justice, is no proof to us that they did so appear. However sound then the legal conclusion might be, if the facts existed, we cannot reverse unless it were shewn, as a bill of exceptions, when properly drawn, always does shew, that the facts did exist. The impropriety of a reversal would be very obvious, if no one of these matters had been proved, and so may the truth be for aught to the contrary made manifest before us. These are the very doctrines of the cases acted by the counsel of the plaintiff in *certiorari*. In *Broadwell v. Nixon*, 1 South. 362, the judgment of the justice was reversed, because he refused when requested by the defendant, to state to the jury the law on a particular question. But it appeared to this court, and so says the report, that the evidence presented that question to the court and jury. In *Todd v. Collins*, 1 Halst. 127, the propriety of the specific charge requested was made manifest, and before a reversal was ordered. The rule I have stated is a sound one, and will be found uniformly sanctioned whenever it has become the subject of observation. In *Calbreath v. Gracy*, 1 Wash. Cir. Co. 201, it was held that the omission of the court to charge the jury upon important points of law involved in the case, when not requested so to do, is no reason *per se* for granting a new trial. In *Etting v. the Bank of the United States*, 11 Wheat 75, Chief Justice Marshall said, that a judge cannot be required to declare the law on hypothetical questions, which do not belong to the cause, has been frequently asserted in this court, and is we believe incontrovertible. The court may at any time refuse to give an opinion on such a point, and if the party propounding the question is dissatisfied with it, he may except to the refusal, which exception will avail him if, mark the condition, if he shews that the question was warranted by the testimony, and that the opinion he asked ought to have been given. The subject is viewed in the same light in the courts of Virginia and Pennsylvania. *Preston v. Harvey*, 2 Hen. & Munf. 55. *Covert v. Irwin*, 3 Serg. & Rawle 289. *Brown v. Caldwell*, 10 *Ibid.* 117. 14 *Ibid.* 225.

2. The second reason impeached the form of the judgment as to costs. After, in the manner sanctioned by several decisions

Sept. 1828.

Davison
v
Schooley.

of this court, rendering judgment that the plaintiff have restitution, &c. The justice adds, "and also that he recover against the said James Davison forty-six dollars and thirty-two cents, being treble the costs and charges of the said Benjamin Schooley, by him about this suit in this behalf expended, adjudged by me to the said Benjamin Schooley according to the form of the statute in such case made and provided." It was insisted the single costs should have been first mentioned, and then the treble sum; and the entry, in 2 *Lilly* 325, was referred to where, in prohibition, a writ of consultation was awarded, and after the damages and costs are first separately stated, the following clause is added, "which said costs, charges, and damages, being doubled according to the form of the said statute, amount in the whole to £6. 2. 0, &c. Much respect is certainly due to a course of precedents, and even to a single approved precedent. In the English courts both forms are used. In *Bingham on judgments* 356, is a precedent in these words: "It is further considered by the court here, that the said C. D. do recover against the said A. B. the sum of —l. for his double costs of suit in this behalf by the said court here adjudged, &c. In *Dunbar v. Hitchcock*, 3 *Maule & Selw.* 591, is a similar judgment for treble costs. But whatever may be the formal mode of making up the judgment in courts proceeding strictly according to the course of the common law, it is certain that this mode of entry has not been the practice upon complaints of forcible entry and detainer under our statute. On the contrary the entry made in the present case has been adopted and sanctioned, and it would, it is believed, be difficult to maintain that any thing more is required by our statute which directs the justice to record the verdict "and to give judgment thereon with treble costs." In *Kerr v. Phillips*, 2 *South.* 818, the judgment was in form like the present. Justice Southard, noticing an error in respect to the costs not mentioned by the other judges, said, the judgment too is for the costs of both plaintiff and defendant, which is error and cause of reversal. But any exception as to the form, either escaped his notice or was deemed unavailing. In *Mairs v. Sparks*, 2 *South.* 513, in forcible detainer, the judgment was "that the said J. S. do have restitution of the possession of the said messuage, &c. and also that she recover \$54.49, being the treble costs, &c." To the judgment for costs, exception was ta-

Sept. 1828.

Davison
v
Schooley.

ken, not indeed as to the form, or that the single costs, and then the treble sum should have been stated, but that the costs should not have been actually trebled. The court overruled the objection and sustained the entry. The mode of entry in the case before us, is the form prescribed in *Griffith's Treatise*, a precedent prepared, with deliberation, by an able lawyer, and entitled to the same kind, if not indeed to the same degree, of respect as the precedent in *Lilly*. If necessary, it might be further remarked, that substance rather than form, in the proceedings of justices has been the object of our legislation. It is not easy to perceive what substantial superiority exists, or what desirable advantage is attained by the form which gives first the single costs, and then states how much the amount is when trebled, over the form here adopted, which giving the treble costs, leaves the other to be known by one of the most simple of arithmetical operations. There is no ground for reversal in this respect.

Let the judgment be affirmed.

DRAKE, J. This *certiorari* is brought to reverse the judgment of a justice of the peace rendered on a complaint of forcible entry and detainer. The form of the judgment is objected to. It is copied from that contained in *Griffith's Treatise*, p. 382; and it has already undergone the judicial review of this court, and been held sufficient, *Mairs v. Sparks*, 2 South. p. 513. It had been before decided, that the justice was not bound to make out a regular bill of costs, in the case of *Gould v. M'Kee*, *Pennington's reports*, p. 475.

But the objection principally relied upon, is the refusal of the justice to charge the jury. Affidavits have been read to prove this, but the witnesses leave the fact somewhat doubtful. Some of them say, that he merely read some sections of the law to the jury. Others, that he also made some remarks upon it, the amount of which they do not exactly recollect. This court has reversed judgments for this reason; but they will not do it unless it be made apparent to them, that there was a refusal to charge on a point of law, which arose out of the facts proved in the case, and material to a correct verdict of the jury upon those facts. The state of the case presents the precise words of the charge requested, containing a statement of facts, which might be sufficient, if true, to justify the direction to the jury,

Sept. 1828.

Den
v
Rambo.

which was desired. But the justice was not bound to tell the jury that these were the facts ; nor is this court bound, or at liberty, to presume them so. They are not established before us ; nor do I perceive that any attempt has been made for that purpose, except that, in relation to the mortgage and lease being offered in evidence, a question is asked the justice, and he answers " that he saw no such papers offered." This court cannot say, that the justice refused to charge on a point of law material to the issue, and of course cannot reverse on this ground.

Judgment affirmed.

JOHN DEN *ex dem.* SAMUEL MICKLE *against* JOHN DUNHAM AND JOHN RAMBO.

The transcript when once sealed and certified by the clerk, need not in ordinary cases be altered in date or re-sealed, though the trial does not take place at the first circuit after the transcript is made out and certified ; but the same certificate will answer for the trial of the cause at any future term.

EWING, C. J. In this case the plaintiff was nonsuited at the Circuit, for want of confession of lease, entry and ouster. The defendants have moved that the judgment be not, according to the stipulation of the consent rule, entered against the casual ejector, but that the nonsuit be set aside, because the certificate of the clerk of this court subjoined to the transcript, that the same contains a true copy of the declaration and pleadings in the cause, bears date prior to the next preceding Circuit Court of the county in which the venue is laid. This objection to the date of the certificate, or perhaps more correctly speaking, to the time of sealing the transcript, is founded on the practice of the court of *K. B.* in England, and on the ancient practice of this court prior to our statute, passed in 1799, and now in force, relative to the Circuit Courts. The change however, which that statute introduced in the mode of making up the *Nisi Prius* record or transcript, removed the cause and reason of the practice referred to, and therefore saves the certificate in this case from the force of the objection raised against it.

A view of the English practice, compared with our statute, will lead satisfactorily to this conclusion.

 Den
v.
Rambo.

The proceeding whereby the issue to be tried, is transmitted from the court of King's Bench to the Court of *Nisi Prius*, which is called the *Nisi Prius* record, and is equivalent to what we denominate the transcript, is made up in the former court in the following manner, and contains the following matters. In the first place, a *placita* which is always of the term in which issue is joined. Then a copy of the pleadings to issue, preceded by a memorandum, or entry of the time of the filing of the bill or declaration. Then an award of the venire. Then another *placita* of the term preceding the Assize or *Nisi Prius* Court, at which the cause is intended to be tried, and which of course will be precisely similar to the first *placita*, where the cause is to be tried in the vacation next after the joining of issue. Then follows the *jurata*, as it is called, or a clause setting forth the time and place where the issue is to be tried, and the time and place at which the jury process is made returnable, and is to this effect: "The jury between A. B. plaintiff, and C. D. defendant, of a plea of trespass on the case, (or whatever the form of action may be) is respited before our Lord the King at Westminster, until — (the return day of the *distringas juratores*,) unless his Majesty's justice assigned to take the Assizes, in and for the county of — shall first come on — (the day of Assizes) at — (the place where they are to be held,) in the said county, according to the form of the statute," &c. And then is added the *sciendum*, which is an entry of the time of delivery to the sheriff of the jury process. When the *Nisi Prius* record is thus prepared, which is done by the Attorney, he carries it to the *Nisi Prius* office, where it is examined, sealed and passed. The *jurata*, as already remarked, is to state the time and place of trial, and the time and place of the return of the jury process, and so rigorous is the rule of practice in this respect, that in the case of *Crowden v. Rooks*, 2 Wils. 144, the record was made up for trial at a certain time, the cause did not then come on to be tried, the plaintiff's attorney omitted to have the *jurata* altered, and the cause being tried at a future day, it appeared on the face of the *jurata* and *postea*, that the trial was had after the day of the return mentioned in the *jurata*, and for this reason the verdict was set aside. Hence if it happen that the cause is not tried at the time first mentioned in the *jurata*, it becomes necessary, when it is to be brought on again for trial, to have

Sept 1828.

Dea
v
Rambo.

the day of *Nisi Prius* and the return day of the *distringas* erased, and the new day of trial and return inserted; and, of consequence, to have the record again examined, sealed and passed at the *Nisi Prius* office.

Our mode, however, of making up the *Nisi Prius* record or transcript, is much more simple and the matters to be contained in it are much fewer in number. The statute directs "that when a cause is to be tried at a Circuit Court, a transcript of the declaration and pleadings in the cause, with a proper *placita*, and nothing more, shall be made and sent under the seal of the Supreme Court to the said Circuit Court." *Rev. Laws* 454. A *jurata* is neither requisite nor admissible. The time and place at which the issue is to be tried, are not set forth on the face of the transcript. No incongruity can therefore exist, as in the case of the *Nisi Prius* record, between it and the *postea* in respect to the time of trial. Hence the transcript, if the trial does not take place when at first expected, needs no alteration to prepare it for trial at a future day, and therefore when once sealed, needs not again to be resealed. When once properly made out and sealed, it contains all that is requisite whensoever the trial may occur, unless when some matter happens after the joining of issue; or after the transcript has been made out, which for the sake of regularity or congruity ought to appear on the face of the transcript. Thus, it is said, that if one of several plaintiffs or defendants dies after issue joined, the cause of action surviving, and a suggestion is made, that a proper entry should appear on the transcript so as to direct the judge at the Circuit, between whom the issue is to be tried; and so of other matter. And hence it has been argued that the certificate of the transcript should bear date, and be sealed subsequent to the last preceding term of this court. But admitting, that these matters ought to be inserted in the transcript, no other consequence results than that the plaintiff should cause his transcript to be made out after they have occurred, so as to contain them, or, if once made out, and the cause not being tried, they afterwards occur, he may then have occasion to procure another transcript, and in this respect as in any other, if the transcript omits what it ought to contain, he may expose his verdict to jeopardy. But it by no means follows, when no such extraordinary occurrence has taken place,

that the transcript may not be certified and sealed at any time after issue joined, or that the cause being once carried to trial, the plaintiff is obliged to procure another, with the exception of the date, exactly like the former, or to perform the idle task and incur the useless expense of simply changing the date of the first.

Sept. 1828.

Blair
v.
Snover.

Motion to set aside nonsuit refused:

JOHN BLAIR, JUN. *against* SAMUEL K. SNOVER.

CERTIORARI.

If two partners agree to divide an account against a joint debtor, equally between them, and the debtor consents to it, and promises to one of the partners his moiety of the debt, the partner to whom the promise was made may maintain an account for his half of the account.

On the trial of the appeal, before Warren Common Pleas, the court nonsuited the plaintiff, because the state of demand did not set out a legal cause of action.

W. C. MORRIS, for the plaintiff, in *certiorari*, moved to reverse the judgment of the Common Pleas, and contended that the state of demand set forth a sufficient cause of action.

EWING, C. J. The state of demand in this case exhibits a legal cause of action.

Snover was indebted to John Blair, junior, and John S. Blair, as partners. A dissolution of the partnership took place. The account between them and him was then adjusted. The late partners agreed that the account should be equally divided between them, and each receive a moiety. Of this agreement Snover was informed. He consented to it; and upon his express promise, then made to John Blair, junior, to pay him one moiety of the debt, this action was brought.

A promise and a sufficient legal consideration for it are shewn in the state of demand. Although the debt was originally joint, yet with the consent of the debtor it might be severed. Each partner being entitled to an equal interest in the partnership concerns, an undivided moiety of each debt was in reality due to him; and no principle could forbid the partners, with the assent

Sept. 1828.

Blair
v.
Snover.

of the debtor, from dividing a debt, any more than any other partnership property, since with his assent no impracticability of making a division existed; nor could any principle forbid the debtor from becoming separately responsible to each, for what, in all, he was bound to both.

In *Garret v. Taylor, Esp. Dig.* 117, three persons had employed the defendant to sell some timber for them, in which they were jointly concerned: to two he had paid their exact proportion, and they had given him a receipt in full of all demands. The third brought this action for the remainder, being his share, and an objection being made, that this was a joint employment, by three, one alone could not sue. Lord Mansfield, held that where there had been a severance as in this case, one alone might sue. In *Austin v. Welsh, 2 Mass.* 401, it was held that no agreement between partners themselves, to sever their interests, would entitle either of them to sue alone, but if such agreement was made between them and communicated to a person jointly accountable to them, and he had consented to the severance, and to account with each for his part, he would be responsible to each for his part; and in that case a moiety was under such circumstances recovered. Chief Justice Parsons, in delivering the opinion of the court, said, "The consent might be either express or implied. If a factor should in fact account with, and pay one partner his share, and thereby discharge all his interest in the partnership, this would be an implied engagement to account with each partner separately."

The Court of Common Pleas, in my opinion, erred in ordering a judgment of nonsuit "on the ground" as stated in the action to the *certiorari*, "that no legal cause of action was set out in the state of demand."

Upon the reversal of this judgment a question occurs, what farther is to be done? Are we simply to reverse and leave the plaintiff below to the prosecution of a new suit, and thus without his default deprive him, through the error of the Court of Common Pleas, of the advantage resulting from the judgment he had obtained? Are we, as some have contended, to send the cause to trial at the Circuit, and thereby in many cases impose on the parties an expense greater than the amount in controversy? On consideration, I am satisfied there are some cases in which a reversal only should be ordered; in others, and the

Sept. 1828.

Blair
v.
Snoover.

present is one of them, the cause should be remitted to the Court of Common Pleas, in order that the judgment given by them, being now removed out of the way, the appeal may be farther prosecuted there, and be heard and determined according to law.

Let the judgment of nonsuit be reversed, and the record and proceedings be remitted to the Court of Common Pleas.

DRAKE, J. The court below nonsuited the plaintiff, because no legal cause of action was set out in his state of demand. By that, it appeared that after the dissolution of a partnership between the plaintiff and one John I. Blair, the debts owing to the late firm were divided between them, and among others, a debt due from the defendant. The late partners called on the defendant, and stated the arrangement between them, and the amount of his debt, which he admitted, "and in consideration of the premises, undertook and promised the said John Blair, jun. to pay over to him one moiety of the said account, to wit, the sum of \$159.82. The declaration further states, that after paying \$100, in pursuance of this agreement, he had refused to pay the residue, for which this action was brought.

The objection appears to have been, that it was a partnership claim, and therefore should have been sued for in the names of both the partners. But the debt, in equity, was due to the two partners, in such proportions as they should agree. And after they had agreed what proportion of the debt belonged to each of them, the original debt certainly constituted a good consideration to support promises to pay, to the partners individually, the sums to which they were, by such agreement, respectively entitled. And the defendant having made the promise stated in the declaration, there can be no good reason why an action should not lie to enforce it.

Sept. 1828.

Den
" Dimon.

DEN *ex dem* STEPHEN DIMON *against* JONATHAN DIMON.

EJECTMENT.

A defendant in an action of ejectment, cannot set up an onstanding mortgage in the hands of a stranger to defeat the title of the mortgagor or his heirs.

The assignment of a mortgage ought to be by writing under seal.

The payment of the money due on the bond which accompanies a mortgage, gives to the person paying the bond, no title to the mortgaged premises.

ANDERSON, for plaintiff.

J. S. Halsted, for defendant.

FORD, J. Delivered the opinion of the court.

Stephen Dimon, the plaintiff, made title to *one tenth* of 48 acres of land whereof his father John Dimon died seised in fee, and from whom it descended to his eight sons and four daughters, in the proportion of one tenth to a son, and one twentieth to a daughter. It appeared, however, that the ancestor in his life time had mortgaged the whole 48 acres to secure the payment of a bond to James Henry for \$86.59, which money was due and unpaid at the time of the ancestor's death. The defendant then produced the bond containing three endorsements of money, which he had paid on the same, the last of which was \$214 in full of the said bond; he also produced the mortgage containing an assignment thereof to him, under the hand, but not under the seal of James Henry, in the following words: "May 29th 1818, I do hereby assign all my right and title to the within mortgage to Johnathan Dimon;" upwards of eight years afterward, on the 26th of November 1826, James Henry endorsed a formal assignment, on the mortgage, under his hand and seal, to the defendant, but it was not so assigned till just before the trial of the cause, and long after the commencement of the action, and after the plea of not guilty. It was assigned however in consideration of payments made in 1818. The bond, mortgage, payments, and assignments being duly proved, the mortgage thus assigned was offered as evidence of title for the defendant, but was overruled by the court. The defendant now moves for a new trial on the ground that this evidence ought to have been received in either of these points of light.

The *first* ground is, that if the mortgage had never been as-

Sept. 1828.

Den
v.
Dimon.

signed, it nevertheless would be a good subsisting title in James Henry, and would have proved that the title of the premises was not in the plaintiff. Now it will readily be admitted as a good general rule, that a plaintiff in ejectment cannot recover premises, the title to which is in a third person, and not in himself; but this rule never obtains where the outstanding title is a mortgage. For though such mortgage be a title at law for the mortgagee or his representatives, if *he* or *they* come into a court of law to enforce it; yet until they do enforce it by action or entry, it is so far from being a title that the mortgagor is considered in law the owner of the land; and no *stranger* or *third person* will be allowed to set up such mortgage against *him* or *his heirs*. In *Rex v. St. Michaels*, Doug. 610, Lord Mansfield said, "It is an affront to common sense, to say that the mortgagor is not the owner of the land." Agreeably to this it was holden, in 7 *Johnson* 282, "that a mortgage before foreclosure or entry, is not regarded as a *legal title*, which a stranger can set up." The same doctrine was holden in 4 *Johns.* 43; 6 *Johns.* 290; 7 *Johns.* 380, and a number of other cases collected in *Adams on Ejectment*, 29, note 3. 1 *South.* 275; 2 *South.* 865. Therefore if this mortgage had never been assigned to the defendant, it could not be set up by him against the mortgagor or his heirs.

But *secondly*. The mortgage was assigned by James Henry, regularly under his hand and seal, after the commencement of the plaintiff's action, and the title under the assignment was thereby vested in the defendant. But a title that has been acquired by the defendant, since he entered and dispossessed the plaintiff, cannot justify him for having committed those tortious acts, at a time when he had no title to justify him; nor can an assignment have relation back so as to heal a prior trespass. Beside a mortgagee, who is not a party, has no power to interpose his mortgage in such a manner as to fling the costs of a suit, which was rightfully brought at the time, on the party who brought it. It would be allowing to a mortgagee all the benefit of being made a defendant, whether he had the right to be made such or not, and with the further advantage of not being liable for costs in any event of the suit. Therefore, an assignment that was obtained from the mortgagee, after the suit is commenced, and after the defendant had plead to issue, ought not to have been

Sept. 1828.

M'Dermot

Butler.

received in evidence, and in this point of view was very properly overruled.

But *thirdly*. It is insisted that the defendant's title accrued to him as assignee at the time he paid the money on the bond, which was in the year 1818, long prior to the commencement of the action, and that the subsequent assignment, under seal, was not the title, but only the evidence of it. That courts of equity do consider the debt as the principal, and the mortgage for its security as an incident which follows and attends the principal, need not be controverted; nor that they would consider James Henry, from the time he received the money, as a trustee holding the mortgage for the use of the defendant, and that the defendant had therefore an equitable title to the premises. But no *equitable title* will avail in an ejectment. The cases in which it was once held otherwise have long been overruled, and any argument upon a point so fully and ably settled, would appear at this time to be out of place. See *Adams on Ejectment* 32; the cases cited in his margin and in note 6. It never has been held at the common law, that payment of money for land gives a title to it, without a conveyance; it may entitle the party to a decree for specific performance, on application to a court of equity; or in a court of law to damages for breach of covenant; but the title itself remains unchanged, and may be conveyed, contrary to the covenant, to any other person not having notice of the contract. So that an agreement for the purchase of land and even payment of the full consideration for it, gives no title at law; and on the whole case the verdict is right.

M'DERMOT against BUTLER.

ATTACHMENT.

There must be an order of the court, to authorise the issuing an attachment against a party for not obeying an award of arbitrators, which had been made a rule of court.

In May term, 1827, a rule of this court was taken on behalf of Butler and entered in the minutes directing a writ

of attachment for the non performance of an award, to issue against M'Dermot, returnable to September term; at that term the writ of attachment was quashed for irregularity. No application was afterwards made to the court, but a new writ was issued, tested as of February term 1828, returnable to May term 1828. No prosecutors name was endorsed on the writ. The Attorney General was named as attorney, but without pretence that he was in any way concerned.

Sept. 1828.

M'Dermot
v.
Badler.

Green, on behalf of M'Dermot, moved to quash the writ of attachment. First. Because it had been issued without any order of this court. The statute (*Rev. Laws 159, Sec. 1.*) allowing this proceeding, expressly directs that it should be on motion. This court allowed the party to issue a writ returnable to the September term 1827. That writ was quashed. The order or motion ought to have been renewed. If the party intended to follow this matter up, he ought to have applied to the court, and given the opposite party notice of his application. The court would perhaps have refused his application. The party complained of, might have tendered the release, which it was the object of the applicant to obtain. In analogous cases, this court have directed that the rule must be renewed from term to term. 2 *Halst.* 170.

The second objection was, that the name of the prosecutor was not endorsed on the writ, nor even the name of his attorney. This he considered essential to enable the party to obtain his costs. The proceeding was a novel one, and the party ought to be held to strict practice. It was so determined in the case of attachment for not obeying a *subpoena*. 1 *South.* 140. This proceeding is now considered in the nature of a civil proceeding. *Willes Rep.* 292. 1 *Term, Rep.* 286. 1 *Black. Rep.* 638. 1 *Bac. Abr.* 285. It is so recognised by the act authorising the proceeding; it is to be "on the motion of the party." *Rev. Laws 159.* This court has determined in the case of *certiorari*, that if the name of the person suing out the writ is not stated, the writ will be quashed. 2 *Halst.* 84.

Scudder, contra.

Hamilton, replied.

CH. JUSTICE. It is a clear principle, that to justify the issuing

Sept. 1828. of an attachment, an order of the court must be made. Was there then any order authorising this writ? By recurring to the minutes, we find an order directing a writ to issue, returnable to September term 1827. The writ before us is returnable, not to September term 1827, but to May term 1828, and is not therefore within the terms of the orders.

**Andruss
v.
Stewart.**

Why the application was made for a writ, returnable at a specified time, when it might as well have been for an attachment generally, without designating any term, we know not, but so the party thought fit to ask for, and enter the order. Suppose no writ had been issued until May term 1828, the writ then returned would not have been authorised by the rule. The case is not altered, because a writ was returned to September term, and was then quashed. The argument from the decision, in 2 *Halst.* 170, is very strong to shew that the rule taken in May term was not sufficient to authorise the issuing of this writ.

Writ quashed.

HAMPTON ANDRUSS, EXECUTOR OF HIS OWN WRONG, OF ALCHE ANDRUSS, APPELLANT against THOMAS P. STEWART, APPELLEE.

An appeal bond executed by a minor, (against whom a judgment has been rendered,) and by a substantial freeholder, is sufficient to sustain an appeal, although the guardian who was appointed by the Justice's Court to defend the suit, did not join in the bond.

RYERSON on behalf of Andruss, the appellant, moved for a peremptory mandamus to be directed to the Court of Common Pleas of Warren county, to compel them to reinstate an appeal. He founded his application upon a statement of facts agreed upon by the parties, in the following words. "It is agreed between the parties that the appeal was dismissed by the Court of Common Pleas, upon the ground that the appeal bond was executed by Hampton Andruss, a minor, who appeared before the justice, and defended the suit by Joseph Andruss his guardian, appointed by the court. It is admitted that the said bond was also executed by Wilson Hunt, a responsible freeholder of the county of Warren, as surety. It is further agreed between the parties to this

appeal, that application may be made to the next term of the Supreme Court, without further notice, for a mandamus. And if the said Supreme Court shall be of opinion that the Court of Common Pleas erred in their decision, that a peremptory mandamus issue to restore the said appeal."

Sept. 1828.

The State
v.
Prall.

Vroom, contra.

CH. JUSTICE. The question is, whether the bond is a substantial compliance with the law. We think it is; for although the infant may not be bound, competent security is given to the appellee—and if with such a bond the appeal be not allowed, the infant may be prevented from appealing altogether, for the guardian is not obliged and may be unwilling to enter into the appeal bond, and thereby render himself liable for the payment of the sum recovered and costs.

Peremptory mandamus ordered.

THE STATE *against* ZACCUR PRALL

An order of filiation is a judicial act, and must be executed by the justices jointly and not separately. Therefore an order of filiation though agreed upon when the justices were together, yet if it was signed by them separately, and in the absence of each other, will be quashed.

On a *certiorari* to justices and overseers removing an order of filiation and maintenance—the justices in answer to a rule on them, for that purpose, certified "that they met and agreed on the sum of sixty-two and a half cents to be paid by the father, and thirty-seven and a half cents by the mother, in case she should not take care of the child herself, and made a rough draft of the order, but could not say whether they signed it or not; one of the justices took it home with him, and from it drew the order now sent up, and signed it himself, and forwarded it to the other justice, who also signed it, and forwarded it to the overseer of the poor; that the said justices signed it separately in the absence of each other; that in drawing this order a mistake was made by inserting sixty-seven and a half, instead of sixty-two and a half cents, for the father to pay, which mistake

Sept. 1822.The StateFrell.

was afterwards discovered and corrected ; the justice who drew the order and made the correction thought they were together when it was corrected ; the other justice thought it was likely they were together."

Saxton, for the defendant, moved to quash the order, and insisted, that the making of the order, was a judicial act delegated to two justices, by the statute ; that they must execute it jointly ; that the signing of the order by one in the absence of the other was erroneous. 1 Cox, N. J. Rep.

Ewing, C. J. The statute has authorised two justices to take examinations and make orders of filiation and maintenance. The authority given by the statute must be strictly pursued. The making of the order is a judicial act, and must be executed by the justices jointly, and not separately, as the cases referred to fully proved. Although the justices met, and agreed on the sum, yet it was necessary they should be together and act jointly in every part of the duty assigned them, until they had completely executed their authority, by signing the order. The order before us having been signed by each justice in the absence of the other is erroneous, and must be quashed. It appears, also, that in the order as signed, and delivered to the overseer of the poor, an error was committed by inserting sixty-seven, instead of sixty-two and a half cents, which was afterwards corrected. The justices think it likely they were together when this correction was made. This circumstance does not alter the law, but rather proves the wisdom of the rule requiring a joint execution of the authority, for if the justices had been together at the time the order was signed, this mistake in all probability would not have been made.

Let the order be quashed.

Sept. 1828.

THE STATE *against* JAMES GUILD.State
v.
Guild.

10	163
162	237
662	339
10	168
65	506

A verbal confession of guilt, made by a person accused of a crime, if induced by a delusive hope of impunity excited in his mind, will not be received in evidence; and a written examination of the accused made by a justice within a few hours after the verbal confession, will also be inadmissible upon the presumption that the same inducement which operated upon his mind at the time he made the verbal confession, might have continued to operate, at the time of the written examination.

When once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature flows from the like influence, and such presumption ought to be overcome before the confession can be given in evidence.

Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believe, from the length of time intervening, from proper warning, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled.

A prisoner may be convicted on his own confession, when proved by legal testimony, although it is uncorroborated by any other evidence, provided the *corpus delicti* be proved.

Corroborating circumstances, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such in short, as may serve to impress a jury with a belief of its truth.

A boy of the age of twelve years and five months, may be convicted on his own confessions, of the crime of murder, and executed. The capacity to commit a crime necessarily supposes the capacity to confess it.

THIS case came on to be tried at the Hunterdon Oyer and Terminer, holden at Flemington, on Friday the 9th day of May 1828.

Wm. Halsted, jr. counsel for the State.

Mess: Scott, Saxton, Clark, and Prall, counsel for the prisoner.

The jury having been sworn and affirmed, the prosecutor introduced his evidence, by which it appeared:—

That Catharine Beakes, on the 24th day of September 1827, resided in the township of Hopewell, in the county of Hunterdon, in a small house situate on the side of a public road. She was upwards of sixty years of age, and in good health; her family consisted of herself, her son, (Jonathan Vankirk) and a grandson, a little more than ten years of age. At noon her son went to work for a Mr. Titus, in the neighborhood, and her grandson went to school, and she was left alone in the house.

Sept. 1828.State
v.
Guild.

The prisoner was a coloured boy, born on the eleventh day of April 1815, the servant of one Joshua Bunn, who was the nearest neighbor to the deceased, his house being situate one or two hundred yards distant, towards Pennington, and on the opposite side of the road. There was a cornfield immediately across the road opposite the house of the deceased, in which the prisoner was that afternoon engaged, alone, in cutting up corn.

About half past two o'clock, Charles F. M'Coy, with his team and boy, was passing that way, and before he got to the house, saw the prisoner about twenty yards from the road, under an apple tree in the same field where he had been at work. He hallooed to witness, or his boy, and appeared in a good humor. He was hacking the tree with a corn knife. Having some errand at the house, witness stopped his team opposite, went to the door, and knocked; nobody answered. Witness concluded he could do his errand on his return, and left the door. As he was going away he heard a noise something like the moving of a chair. He proceeded however on his way, and returned about five o'clock; near the door he met the little boy coming home; asked him if nobody was at home? he said his grandmother was. He stepped into the door and flew back. Witness entered, and saw her. She lay in the corner of the fire place, her head near the back, but did not touch it. "I told the boy to run to Joshua Bunn's. I raised her and set her against my knees. I, at first, thought she had had a fit, and fell and bruised herself. But she bled wonderfully. I put my finger on the top of her skull, and it appeared to be mashed in. I looked round and saw the yoke (a horse yoke) about four feet off. There was some blood on the yoke. The first person who came was Rachel Bostedo, an old woman. She asked me what was the matter. I told her I believed the old woman had been murdered. She did not come in. Mr. Vankirk and his son then came. Then Mrs. Bunn. She was yet alive. I saw no motion of the body after I raised her up. There was a wound on the top of her head; one on the right temple; one on the right eye; and one on the under jaw. I do not suppose these bruises could have been made by falling. It appeared she had been at work, as a cap lay on the hearth by the side of her."

Doctor Springer testified, that he was passing by about dark

Sept. 1828.

State
v.
Guild.

went in and found her lying on the floor ; her hair clotted ; her breast covered with blood, which was still flowing ; her head dreadfully mangled ; the scalp loose and cut through ; a large bruise on the right side of the head ; the under jaw broken. The wounds were sufficient to produce death ; and so great was the quantity of blood she lost, witness had no doubt her death was produced by the wounds he examined. He should not have known her she was so disfigured. A blow with the yoke by a boy might produce death. The wounds could have been produced by that stick. Witness is a physician, &c.

On the same evening a coroner's inquest was held over the body. A constable went for the prisoner and he was brought up. He was asked if he knew any thing how the old lady came to her death. He denied knowing. He was twice asked.

Daniel Cook, esq. testified that "the next day, about one o'clock, I met some persons who told me they had got the murderer ; that he had made confession. I found him at Mrs. Beakes. I had him put into my wagon. I did not hold out any promise or threat ; nor did any other person to my knowledge. It was about half a mile to Davis' tavern. On the way, I asked him, Jim, did you kill the old lady ? yes, said he, I did. Why did you not tell me this last night ? He said I was afraid. I got to Davis', and sat down. I then told him I wanted him to tell me what he had done ; to tell the truth and the whole truth. I took his examination in writing." Here the examination was offered, when Mr. Scott, a counsel for the prisoner, rose and stated that there had been previous threats or promises to the prisoner, and to establish that fact called

Joseph Davis, sworn : " On the morning of the 25th of September, Joshua Bunnell requested me to go down to the house of Mrs. Beakes. We went down and found several people there. The boy was describing some person that came out of the Stony Brook road. They went in pursuit of the person. I remained and took my seat on the Piazza in front. I observed the boy opposite cutting up corn. Hearing that suspicion had risen against him, I watched his motions. His manner of working excited suspicion in me. I had my eye on him. He did not seem to mind his business. Frequently looked towards the house. Some person requested me to go home. The people brought back a man of the name of Peter Tucker. Afterwards I went

Sept 1828.

State
v.
Guild,

back to the house. I saw a man talking with James (the prisoner) in sight of the house, in Mr. Bunn's cornfield. I think it was Andrew Titus. I went to them. I told the prisoner that I believed he was guilty of the murder of that woman. He said he was not; looked down as he spoke. I told him that I understood that some person had seen him about the house that afternoon. I then asked him what was to be done about it? He made no answer that I recollect. I then asked him, whether he would not run away, since it appeared that he was guilty? He said yes he would go right off. I told him he had better not, it was not a proper time of day for him to run away. He had better postpone it until night. He then said, he did not know where to go to. I told him if he would call on me that evening, I could tell him something about it. As he appeared at the time to be under a deep concern, I asked him if he could help himself if he did run away? He said he could not, he had no money. I then told him if he called on me that evening, I could help him to a quarter of a dollar or two. He said he would. I related to the people at the house the above conversation. They then went and brought him to the house. Charles M'Coy, Andrew Titus, Abraham Schenck and others. When they came to the door, he was told by some of the company, that if he was guilty of this murder, he had better confess it, for as he could not retain it long, he might as well confess it first as last. He denied committing the murder. I told him if he was not guilty, not to own it, but if he was guilty he had better confess it. He then said that he done it. I believe I told him it was a pity such a fine boy should be hanged."

Cross-examined: "I expressly told him that if he was not guilty he should not confess it. They found some blood on his clothes, and asked him where that came from. He said he must have got it from killing a sheep."

The counsel for the prisoner asked the witness "whether it was not his opinion that the prisoner's confessions arose from the hopes or fears excited in his mind by the conversations and other circumstances of that occasion? Objected to, and overruled by the court.

Charles M'Coy sworn: "After Davis had talked to the boy, Joseph Rue and I went after him. He started to run, I caught him. He asked me what we were going to do with him, I told

Sept. 1828.

State
v.
Gattd.

him we were going to take him over to the house. I told him I was going to make him put his hand on her ; that I had heard, if a person had murdered another, make him put his hand on her, and she will bleed afresh. He said I am not going there. I took hold of him to lead him along. Abram Schenck took hold of him the other side, and led him along. He began to cry. After getting into the yard, it struck me to examine and see if there was any blood. I told him to pull off his coat. We found on his waistcoat two specks of blood. He said they had been killing a sheep a day or two before, and he had got the blood then. I asked him to go in the house. He said he was not going. I said, Jim, if you have done this act you had better confess it. He hung his head, and after a while he said he had done it. Some of the company stepped up and said, did he say he had done it? Jim said no. I then told him, Jim, you say you have done it ; you had better confess it ; and if you have, just tell us now what you done it for. After discovering the blood he seemed more confused. I did tell him if had not done it not to confess it, but if he had, he had better tell the whole truth. I am not certain, but I think Mr. Rittenhouse told him that if he would confess he would probably get clear. This was before the blood was discovered, and before the confession of the fact. This was ten o'clock next day. He soon after went with Esq. Cook to Mr. Davis'. I have lived in the neighborhood within about a mile and a half of Mr. Bunn's ; have had frequent opportunities of conversing with the boy. He has as much sagacity as any boy I know of his age ; was always accounted a smart, cunning, mischievous kind of boy."

D. Cook, esq. The night before, and next day particularly, I told him to tell nothing but the truth. Before taking his examination, I asked him if he knew any thing about the nature of an oath. He said he did not. I told him he must tell nothing but the truth ; if he did, when he come to die, he would go to punishment. He said he knew that well enough. He has a great deal of understanding ; as much as any black boy I am acquainted with."

Joseph Davis. "He is reputed a cunning smart boy."

Jonathan Vankirk. "He is accounted smarter than common black boys of his age ; full of mischief ; think him a cunning boy ; ingenious to get out of a scrape."

Sept. 1892.State
v.
Guild.

The court excluded the written examination, and overruled the preceding confessions.

The court adjourned until Saturday morning, 9 o'clock ; at which time the court was opened.

Mr. Halsted offered to prove confessions made by the prisoner to various persons, five months after the first ; after counsel had been assigned him ; and after he had been cautioned not to expect favor, &c. ; and proved by Esquire Cook, that on Saturday morning of the October term, he told Jim (the defendant) that he must expect death and prepare to meet it ; his countenance changed, but he made no answer.

Esquire Thompson. " And by the next day after he came to gaol, he confessed the facts, and that witness told him he must abide the consequence, and could not expect to escape."

The confessions were objected to, being the same in substance with the first. The objection was overruled, and the confessions permitted to be given in evidence.

Eli Herbert sworn. " In February term I had some conversation with him. Took in several people. He said he went there (house of deceased,) to borrow a gun, and the old bitch would not lend it to him. He said as he was going out of the door, he saw the yoke by the door. He picked it up and went back. He did not know whether she saw him or not. He struck her. She did not fall. He struck her again, and she fell. He then went toward the door, and then he thought if she got well, she would tell his mistress, and his mistress would thrash him. He then went back to kill her, and did kill her."

Similar confessions were proved by Henry Gulick, Ralph Stevenson, Ralph Knowles, S. G. Opdyke, esq. Charles Bonnell, esq. Thomas J. Stout, and others ; made at various times, as late as the month of February, and with more or less particularity. To Henry Gulick he said that " she made him mad ; accused him of things not true. She accused him of killing fowls or chickens, and letting out pigeons." To S. G. Opdyke, esq. he said, " he did not intend to kill her in the first place. The first blow did not knock her exactly down. He thought he would give her another. He then said he gave her the third blow with the intent to kill her. The deceased was sitting by the fire blowing the fire. Struck her back of the head. Came up behind her." To Ralph Knowles he said, " he had killed the wo-

Sept. 1828.

State
v.
Guild.

man and was sorry for it. He went there to get a gun belonging to Johnathan Vankirk, and Mrs. Beakes refused to let him have it. She asked him why she should let him have the gun, as he had let out her pig and pigeons. He said, she was saucy. She was starching a cap, and stooping down on the hearth. He struck her. The second blow she fell. He then desisted; but he thought if she told of him he should get a terrible flogging, and then he concluded he would kill her, and she would not tell of it. He struck her a third, and, I believe, a fourth time."

Charles Bonnel, esq. sworn. I had been in the habit of going to the prison very often, and when I went the boys would be running in and asking him questions. In September last, I had cautioned James not to be making these acknowledgments to the boys as they were talking to him. He was told by the boys he would be hung, and all that. He said he did not care a dam, he would swear at the boys. In February last he said he had killed her. Said he had killed the damned old bitch with the end of the yoke. Said he went to borrow a gun, and she would not lend it," &c.

Cross-examined. "He appeared to have considerable wit, but wanted discretion and good sense. Seemed to be irritated by others, and that was the cause of much of his bad conversation. I thought there was too much talking to him. Kept growing worse. Had devil enough in him when he came there."

Thomas J. Stout, sworn. The week before February court, he was talking about it, in a loose manner, as he generally did. When asked if he thought the case would terminate against him in court, he said he did not care a dam. Would often rip out something against the boys passing. He appeared acute in many things, but did not appear to realize his situation. Never appeared cast down; always cheery. Appeared a little more deliberate when telling the circumstances of the old lady's death than on other occasions."

Cross-examined. "He did not appear to realize his case as a discreet or rational person would."

J. J. Young, esq. sworn. "At the time of the burning of the court-house, I had considerable conversation with the boy. I thought him full as acute as boys in common. His memory seemed to be correct."

Sept. 1828.

State
v.
Guild.

Jonathan Vankirk, called again. "I had borrowed a gun and had it in the house some time. The boy knew I had it. I had a pidgeon in the crib. We had a shoat that got hurt, and the deceased thought that the defendant run over it with a horse, as I heard her say. When I went out of the house the yoke was by the side of the door."

Witnesses for defendant :—

Stephen Albro, sworn. I came to the gaol about the middle of November. The boy was a prisoner there. I heard his conversation, and observed his manners until he was removed to Somerville. Heard him express himself in respectful terms of his master's family. Never heard any ill-will expressed towards his mistress. He would answer in an impudent way when interrogated. I have seen many boys of his age having a greater share of understanding than he. I do not think he had hardly an ordinary share of it. He appeared to have a smartness of turn when talked to. I have never thought him deep. He had intelligence enough to know when he did wrong, but was wanting in discretion, and could not fully appreciate the consequences of crime. He was often teased and would answer smartly, and insolently."

Cross examined. "He has capacity enough to distinguish between right and wrong; but I do not think he considers or reflects as much as some. I think there are usually too many visitors to such prisoners. I heard some person ask how he came to kill that woman? He said because she made him mad. I think his bad actions proceed more from passion than from malice."

Joshua Bunn, sworn. "A day or two before the murder was committed, James assisted in killing a sheep. I have endeavored to give him good instruction, and in some respects he knows the difference between good and evil. He has some idea of the consequences of evil as respects another world; attended family prayers; often had religious worship at my house; once a month. Should have sent him to Sunday school, but was afraid it would do more hurt than good, he was so inconsiderate and mischievous. He is passionate, mischievous, insolent, but does not bear malice.

The cause was summed up by Mr. Saxton and Mr. Clark on the part of the prisoner, and by Mr. Halsted in behalf of the state.

CHARGE. *Gentlemen of the jury,*

James Guild is indicted for the murder of Catharine Beakes, at the township of Hopewell, on the 24th day of September 1827.

Sept. 1828.

State
v.
Guild.

That a woman by the name of Catharine Beakes, at her house in the township of Hopewell, came to her death, on the 24th day of September 1827, is proved beyond controversy ; and upon recalling to your minds the evidence of the witnesses, and especially of the Physician, respecting the marks of violence visible about her head, I think you cannot have a moments hesitation in believing that her death arose from severe blows inflicted by some hand, not her own ; and by striking with the yoke, produced in court, (which was found near her) or with a club, or some similar instrument of aggression ; and if you consider her death proved to have arisen from a blow, or blows, with this yoke, or a club, or any weapon of the like kind, the indictment is supported in this respect.

The next and great question which arises is, who is the murderer? or rather, is the prisoner at the bar the individual who has committed this heinous offence against the laws of God and man?

The evidence, to fix it upon this defendant is, in the first place,

The circumstances attending this transaction. These, as affecting the prisoner, are none of them very important. The principal are :—

1. He was near the scene working in a field.
2. He was unwilling to go in and see her when told it might prove his guilt.
3. He had some spots of blood on his jacket.

With respect to the last of these, you will recollect the cause to which he ascribed it, and in which he is confirmed by the testimony of his master, Joshua Bunn ; and as to his unwillingness to touch the corpse, a child of his years might naturally have felt all the aversion to it which he manifested, placed in the same circumstances, without any consciousness of guilt.

There are, besides these, some coincidences between the facts detailed in his confessions, and the real state of things as testified by other witnesses. These would be strong proofs of guilt, if he could not have learned them from any other means, except by having gone to the house and seen the body, and oth-

Sept. 1828.

State
v.
Gould.

er things, as they really were. But his confessions were made long after. There were other sources of information, and if you think it probable or possible, that it was furnished from other sources, the evidence arising out of these coincidences will have but little weight.

2. The confessions of the prisoner himself:—

Voluntary confessions, made understandingly, may prove crime. But confessions made under the influence of fear or hope, produced by threats or promises, are not ever admissible in evidence.

The first confessions offered in evidence were considered by the court to be liable to objection on these grounds, and were therefore overruled; and having been overruled, it is your duty to dismiss from your minds any knowledge you may have obtained of them, at least so far as they can operate against the prisoner.

Again. It is said that all subsequent admissions of the same or of like facts, should be overruled, because they may have proceeded from the same influence.

Confessions have been admitted before you by the court of the same, or of like facts, made afterwards, (some months afterwards,) and which, by the application of the above principle in its full extent, would have been rejected. These latter confessions were received, because the court deemed, that although an original confession may have been obtained by improper means, subsequent confessions of the same or of like facts may be admitted, if the court believe, from the length of time intervening, from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. Under this impression of the law, the court, with some hesitation, admitted the confessions; and having been admitted, it is your business to consider them; and to consider them with reference to the manner in which the first confession was obtained; and if you are not satisfied that these latter confessions were made freely and understandingly, and wholly free from any expectation of benefit, raised by the hopes and promises preceding the first confession, or from his continuing to tell a uniform story, it is your duty to reject them from

Sept. 1828.

State
v.
Gaild.

your minds, and not to make them the foundation of your verdict.

It will be necessary then to go back to the circumstances preceding the original confession. I shall briefly notice them. The prisoner was accused of the murder; he was told there was proof of it; that he was seen about the house; he was advised to run away; he was afterwards seized by two persons, and taken near to the house where the murder was committed; he was then told to take off his coat; blood was found on him, and considered by the bystanders as proof of his guilt; he was asked to go in and touch the body, under the superstitious idea suggested by the witnesses; "he was told he had better confess," that "if guilty he had better confess;" he was much pressed to confess, but at the same time told not to confess unless he was guilty; and a witness is pretty well satisfied that one of the bystanders told him "if he would confess he would probably get clear." Under all the agitation, fears, and possible, if not probable hopes, produced by these circumstances, he made his first confession, and immediately after, the one before the magistrate. The court thought these first confessions, thus obtained, should be overruled.

You will next call to mind the circumstances calculated to remove this influence, if it existed, and make the subsequent confessions lawful. These latter confessions were made in February 1828, some months after the first. But you will recollect that they were not made after an interval of silence, and under new circumstances, and in a new situation; but the boy was taken to gaol, and there was a continued series of conversations and confessions, without lapse of time, or other favorable circumstance to bring him to reflection upon his awful situation, or the danger of these unguarded and thoughtless confessions.

With respect to the instructions of grave persons and magistrates; they were general; warning of his danger, to be sure, but not particularly calculated or directed to dispel his false hopes, if such existed, or to open to his mind, and impress upon it forcibly, all the consequences of his conduct. But the fact is with you. And if you are fully satisfied that these confessions were made freely and understandingly, and uninfluenced by the causes of the first confessions, you will then examine the confessions themselves.

Sept. 1828.

State
v.
Guild.

They were made to several persons, and are so fully testified to, that there can be no doubt they were made.

But the defendant is an infant; at the time of the act, and confession, between twelve and thirteen years of age. This fact should make you more cautious in admitting the confessions, and induce you to resolve your *doubts* in his favor.

With respect to the ability of persons of his age, to commit crimes of this nature, the law is, that under the age of seven, they are deemed incapable of it. Between seven and fourteen, if there be no proof of capacity, arising out of the case, or by the testimony of witnesses, the presumption is in their favor; a presumption however growing weaker and more easily overcome, the nearer they approach to fourteen. And at the age of this defendant, sufficient capacity is generally possessed in our state of society, by children of ordinary understanding, and having the usual advantages of moral and religious instruction. You will call to mind the evidence on this subject; and if you are satisfied that he was able, in a good degree, to distinguish between right and wrong; to know the nature of the crime with which he is charged; and that it was *deserving* of severe punishment, his infancy will furnish no obstacle, on the score of incapacity, to his conviction.

If he be guilty of the crime, the next enquiry will be, is it the crime stated in the indictment, that is, the crime of murder?

Murder is defined by *Lord Coke* to be, "where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, with malice aforethought, either express or implied." And it is defined, by *Chief Justice Kirkpatrick*, to be "the killing of a reasonable creature with malice aforethought."

And the law presumes all homicide to be committed with malice aforethought until the contrary appears from circumstances of alleviation, excuse, or justification. And it is incumbent on the prisoner to establish such circumstances unless they appear in the evidence produced against him. 2 *Halsted* 243. Manslaughter is the unlawful and felonious killing of another without any malice express or implied."

"If a man kill another suddenly, without any, or without *considerable provocation*, the law implies malice, and the homicide is murder."

"If it be perpetrated with a deadly weapon, the provocation must be *great indeed*, to extenuate the offence to *manslaughter*."

Sept. 1832.

It is even laid down, "That *no words or questions* are sufficiently provoking to soften the crime to manslaughter, if it be perpetrated with a deadly weapon."

State
v.
Guild.

You will apply these principles to the case before you. You will recollect the slight nature of the provocation. And notwithstanding the eloquent appeal which has been made on this subject to the compassion of the court, I feel it my duty to say to you, that there is nothing in the provocation sufficient to soften the crime into that of manslaughter; but that, if guilty at all, the prisoner is guilty of the crime of murder.

Of this case, you are the constituted judges. I trust you will discharge your duty with caution, with humanity, and at the same time with firmness; with due attention to the claims of mercy, and of justice, of the prisoner and of your country. And that if from the law and evidence you are fully satisfied of the defendant's guilt, you will say so. But if you believe him innocent, or have any doubts, *even the slightest*, of his guilt, you will acquit him. And may he, who knows the truth, guide you to the proper result.

The jury after being out between two and three hours returned a verdict of *guilty*.
G. K. DRAKE.

After the verdict was rendered, Mr. *Scott*, on behalf of the prisoner, moved the court, that the judgment be deferred until the next term of the Oyer and Terminer, that an opportunity might be afforded in the mean time, to take the advisory opinion of the Supreme Court, upon several questions of law which had been discussed by the counsel, and decided by the court in the progress of the trial. This motion was acceded to by the court, and the foregoing state of the case was drawn up by *Justice Drake*, and submitted to the Supreme Court. At the September term, the case was argued by *Clark* and *Saxton* for the prisoner, and *W. Halsted* for the state.

The counsel for the prisoner contended:

I. That the confession made by the prisoner, to *D. Cook, esq.* and the written examination taken before him were inadmissible, having been made so recently after the mind of the prisoner had been operated upon, by the inducements of hope and fear.

Sept. 1829.

State
v.
Gould.

II. That the confessions made by the prisoner after he had been confined in gaol, and five months after the offence committed, ought also to be rejected, because it was to be presumed, that the same inducements which operated upon the mind of the prisoner to make the first confession, continued to influence his mind at the time of the subsequent confessions, and cited the case of *King v. White*, 2 Starkie Evi. 49, and *State v. Aaron*, 1 South. 240.

III. That if these confessions were competent evidence, that they were not sufficient to convict the prisoner, as they were only naked confessions uncorroborated by circumstances. 1 South. 240.

On the part of the state it was contended :

I. The confession made by defendant, to D. Cook, esq. was admissible.

No threat was held out to him or promise of favour, but he was cautioned to tell the truth.

The fact of a person (having no authority) holding out an inducement, such as this case presents, is not sufficient to exclude the evidence. *Rex v. Gibbons*, 1 Carr. and Payne, 97. 11 Eng. C. L. Rep. 327. Wil. 343. *Rex v. Tyler*, 1 Carr. & Payne, 129. Carr. Cr. Law 65. *Rex v. Rowe*, Russel & Ryland, C. C. R. 153; and 4 Dall. Rep. 116. *Commonwealth v. Dillon*, 2 Stark. Evi. 50, note q.

The observations or promises, if any, were all conditional. "If you are guilty you had better confess," &c. &c. differ from *Warickshall & Thompson's case*, Leach. 263—201.

II. If even that evidence was inadmissible, on account of its being made so soon after the inducement to confess was held out to him, yet that the circumstances and lapse of time which intervened were sufficient to efface any impression of hope of favour which might have been fixed upon his mind.

The case of *King v. White*, is cited to shew that all subsequent confessions ought to be rejected. This is a mere note of a manuscript case, and it is impossible to tell what were the circumstances of it; and it has been overruled by later cases.

Whether the impressions on his mind were removed by the lapse of time, or the declarations of judges, Cook and Thompson, were properly left to the jury.

Sept 1828.

State
v.
Guild.

The competency of the last declarations, must rest upon the same footing as the first; that is, whether they were induced by the expectation of favour, or fear of punishment. And *Ch. Justice Kirkpatrick* in the case of Aaron says, if it rested upon that ground, he would have left it to the jury. 1 *South*. 240. *Justice Southard* also was of this opinion.

III. If these confessions were competent, were they sufficient to convict?

It is said they are not.

1. Because they are not corroborated by circumstances. They are mere naked confessions.

2. Because made by an infant.

1. These were not what are understood to be, mere naked confessions uncorroborated.

What is meant by a mere naked confession, such as has been said would not be sufficient to convict, is where even the *corpus delicti* is not proved, as the case referred to in note to 2 *Starkie*, *Evi.* 48 note, where the person supposed to be murdered was still living.

And this must be the case to which *Judge Rossell* refers, when he says no person can be convicted on his own confession, without a single fact to corroborate.

And if he means to apply his remark to cases, where the *corpus delicti* is proved by other testimony, the remark is not law. For it is well settled, at this day, that if a confession be voluntarily made, it is sufficient, if the jury believe it to be true, to convict the prisoner, without any corroborating circumstances to support it. *Wheling's case*, *Leach Ca.* 311 note. 2 *Hawk.* 595. *Tit. Evi. Book 2, Ch. 46, Sec. 37. Carr. Crim. Law* 64. *Russ. & Ry. C. C. R.* 440. *Phi. Evi.* 80. But in this case there were corroborating circumstances, viz.

The circumstance of his relating where the yoke was, viz. behind the door, which he could not have known if he had not been there. That he went to get a gun belonging to Jonathan Vankirk, who it is proved had a gun, &c.

IV. If a naked confession of this kind is sufficient to convict an adult, it is sufficient to convict defendant. See opinion of *Southard*, 1 *South.* 245-6.

The following opinion of the Supreme Court, drawn up by

2

Sept. 1828.State
v.
Guild.

the Chief Justice, was communicated to the ensuing Court of Oyer and Terminer, in October 1828 :

The prisoner, James Guild, was, at the Oyer and Terminer for Hunterdon County, in May last, found guilty of the murder of Catharine Beakes. The court, at the instance of his counsel, humanely suspended the sentence of the law, in order that the opinion of the Supreme Court might be obtained, on some legal points which arose in the progress of the trial. These points were submitted to the court in the term of September, by the prisoner's counsel, with distinguished ability, and with the most laudable zeal, research and industry; and they have received from the court, the careful, anxious and mature examination, which their interest and importance, the situation of the prisoner, and the due administration of public justice, required.

The first question to be considered respects the admissibility of certain confessions of the prisoner which were received in evidence.

The deceased came to her death in the afternoon of the 24th day of September 1827. An inquest over the body was held by the coroner, at her place of abode, in the evening of that day. The prisoner, who was known to have been at work alone in the same afternoon in a corn field on the opposite side of the road, was brought up by a constable, and, on being twice asked, denied that he knew any thing of the manner of her death. About ten o'clock on the next day, he made a verbal confession that he had killed the deceased, to Charles McCoy and others, and shortly after, a similar confession to one of the justices of the peace of the county, by whom it was reduced into the form of a written examination. The verbal confession and written examination, which took place within a short period of each other, were rejected by the court when offered in evidence, because induced, as the court believed, by delusive hopes of impunity excited, not by the justice, who appears to have acted with exemplary circumspection in the discharge of his duty, and without even a knowledge of the promises which had been made, but by other persons innocently misled by a common, and perhaps natural, but mistaken zeal to discover the perpetrator of a cruel and shocking outrage. The occasion does not call for an exami-

Sept. 1828.

State
v.
Gould.

nation at large, of the propriety of the rejection of the proposed proof of these confessions. It is enough to say, that the rule of law by which the court was governed is sound, and there appears to have been enough of fact established, to warrant the court in applying the rule to the exclusion of the evidence.

Confessions were afterwards made by the prisoner, in February succeeding, nearly five months after the perpetration of the offence. These confessions were admitted in evidence. The counsel of the prisoner insist that the admission was illegal, because confessions of a like nature had been previously made under the influence of hope; and because these confessions *per se* and independent of the others were themselves made under the same delusive influence, and with an expectation that by perseverance in their narration, he should escape from punishment, and also, under the excitement of anger from reiterated taunts and accusations thrown out to him when in gaol.

The first of these grounds, the counsel of the prisoner sought to sustain by a reference to the recent and valuable treatise on evidence by *Starkie*, who says in part 4, page 49, title admissions, "where a confession has once been induced by such means, [threats or promises] all subsequent admissions of the same or of the like facts must be rejected, for they may have resulted from the same influence." In examining the soundness of this doctrine, a shade of doubt is at once thrown over it by the fact that no such rule of evidence is to be found either in the ancient reports or in the elder writers. Neither *Hale* nor *Hawkins*, nor *Gilbert* nor *Foster*, nor *Bacon* nor *Comyns*, state any such rule. It is first laid down, so far as my research extends, by *East*, in the second volume of his pleas of the crown, page 658. He cites no case, refers to no authority, but says it is the common practice to reject such subsequent confession. *Starkie* refers only to a manuscript case of *Rex v. White* in Michaelmas Term 1800; but, by whom decided, or in what court, or under what circumstances, he does not relate. It cannot be expected therefore, that we should yield an implicit deference to this position without an examination of the principles on which it rests; and such an examination will shew it, as broadly and unqualifiedly stated, to be unsound and unworthy of confidence. The reason given for the rule by *Starkie*, is, that the subsequent admissions may have resulted from the antecedent influ-

Sept. 1898.

State
v.
Guild.

ence. But in all sound logic, the question must turn, not on the possibility, but the presence of influence; not whether influence once existed, but, whether it continued to exert its force. By the rule, as stated by *Starkie*, the single enquiry would be, has a previous admission been made under improper influence? And if the answer be affirmative, the subsequent confession must be rejected, however thoroughly in the mean time the mind of the accused may be freed from such influence, and however perfectly truth and freedom of volition may have resumed their sway. Surely such a rule cannot prevail unless it be shewn that the human mind having once lapsed into falsehood, must, by a necessity of its nature persevere, without motive or inducement. For if it be true, and the assertion will receive on all hands a prompt and ready assent, that a man having, under given circumstances, made either a false or a true statement, may under other circumstances retract his allegations, and with equal assurance assert the converse of his previous declarations; then it follows that the true criterion is, the actual state of mind of the accused, at the time the confessions were made, and the true question for solution, whether, at that time, he was under undue influence of hope or fear. It is readily admitted, that the antecedent hopes or fears, or other sources of influence are to be brought into account and weighed. It may even be conceded that when once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature, flows from the like influence, and that such presumption should be overcome before the confession ought to be given in evidence. But such presumption being satisfactorily repelled, the evidence ought to be received. The rule stated by *Starkie*, as it goes further, is erroneous. It makes the presumption a conclusive and impregnable bar, and, if understood in its broad terms, excludes the proof, whatever subsequent circumstances to remove the influence may have intervened.

From a careful examination of principles, then, we are prepared to yield a full acquiescence to the doctrine laid down by *Justice Drake*, on this occasion, in his charge to the jury in these words: "Although an original confession may have been obtained by improper means, subsequent confessions of the same or of like facts may be admitted, if the court believes from the length of time intervening, from proper warning of

Sept. 1828.

State
v.
Guild.

the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained, were entirely dispelled."

The rule of evidence seems to have been thus understood, and has certainly been so practised, in the criminal courts of this country. In *Williams' case*, 1 *City Hall Recorder* 149, the mayor (Radcliff) of New-York, submitted to the jury to decide whether an examination in writing, taken in the police office had or had not been made under the influence of the threats, which had preceded and induced a previous confession to the prosecutor, and accordingly either to receive or reject the written confession. In the case of *Bowerhan* and others, 4 *C. H. Rec.* 138, the mayor (Colden) said to the jury: It appears that in the first instance, an oral confession was made manifestly under the influence of a promise of favour, and subsequently an examination was taken in the police in the usual manner. Here no threats or promises were made, nor does it necessarily follow that because the oral confession was made under the influence of promises, that the written examination stands in the same situation, but it will be for the jury to determine, from all the facts, whether the promises previously made continued their influence on the prisoners mind at the time of the written examination; for, if so, then it is to be entirely rejected. The defendant, who had made the confession, with some of the others, was found guilty. In the case of *Mills* and others, 5 *C. H. Rec.* 178, the mayor (Colden) charged the jury in a similar manner. In *Millegan* and *Welchman's case*, 6 *C. H. Rec.* 78, Mr. Recorder Riker, on an objection to evidence, recognized the same principle.

The true rule of evidence being thus shewn, we proceed to the second ground of objection raised by the prisoner's counsel, and inquire whether the court had reason to believe, that the delusive hopes under which the original confession may have been obtained, were entirely dispelled? Whether, when the confessions, given in evidence, were made, the mind of the prisoner was labouring under or was freed from undue influence? These questions present pure inquiries of fact. What in point of fact was the actual state of mind of the prisoner? We have seen that the Court of Oyer and Terminer acted under a correct view of the law, that they prosecuted their search into the facts on sound legal principles, and that they compared the facts

Sept. 1828.

State
v
Guild.

before them with a correct legal standard. Now the duty of this court when a reference, like the present, is made to us by that tribunal, is chiefly to examine and revise matters of law. So in England, when the advice of the twelve judges is required. We cannot review a question of fact with those advantages possessed by the court, before whom the witnesses have appeared. To pass in judgment on the conclusions of that Court, we ought to stand, if not on superior, at least on equal ground. Such a point of view may be obtained in the examination of legal principles; but is rarely accessible in the search of facts. Hence, on this occasion, we might after an investigation of the legal doctrines desist, on this head, from further inquiry. But after expressing, as we are bound to do, a just deference for the determination of the court, we shall proceed to examine it under such lights as the report of the case affords us.

A period of between four and five months elapsed between the first confession and those which were afterwards made by the prisoner and received in evidence against him. In point of time, then the court may well have supposed, there was sufficient room for the first impressions to have subsided, and for the gleams of hope by which at the outset he may have been cheered, to have been dispelled. Soon after the prisoner was brought to gaol, John Thompson, esq. one of the magistracy of the county, had an interview with him, and told him he must abide the consequences of the act which he had confessed, and that he could not hope to escape. It is very probable the prisoner was not aware, that he who thus addressed him was a justice of the peace, yet he could not fail to observe his age and his grave and venerable appearance so likely to excite attention to his remarks. On Saturday morning succeeding the arraignment of the prisoner, he was visited by Daniel Cook, esq. With his person and official character, he was doubtless acquainted, for he was the same person before whom the examination in writing of the prisoner had been taken. He told the prisoner, that he must expect death, and prepare to meet it; and he mentions a striking fact serving to shew the effect produced by the admonition. His countenance changed. His mind received and was touched by the awful warning of anticipated suffering. The delusion of hope was at the least shaken. By Charles Bonnel, esq. another magistrate, who sometimes saw him in gaol, he was cautioned against making

Sept. 1828.

State
v.
Guild.

acknowledgments to the boys as he was accustomed. If upon his arrest, any delusive hopes induced his confession, the disappointment which so soon succeeded would very naturally have removed them. Instead of being better off, he saw his condition become worse. Instead of being clear, he was placed in gaol; he was indicted; publicly arraigned; and assured by a respectable magistrate, that punishment would certainly overtake him. Such a failure of ill-raised expectations, would be apt to produce a revulsion of feeling. Confession had done him no service; had produced no alteration of his sufferings; had obscured instead of brightened his prospects of escape and impunity. What motive then to persevere in the avowal of his guilt? Such avowal had availed him nothing; and what hope then could have remained that any further confessions would be more beneficial? Instead of realizing the anticipation of safety, he found these confessions had brought him positive assurances of a melancholy doom. When then, he persevered in making these confessions, it is a most reasonable inference, that he was actuated by some other motive than the undue influence of previously conceived hopes of impunity. His counsel said, on the argument before us, that having once made the confession, it was natural for him to persevere in the same tale. Such may be the result, if the confession were true. But a steady adherence to falsehood, which he saw produced him no benefit, and was assured would consign him to death, cannot, it is believed, be reconciled with any ordinary principles of human conduct.

The counsel of the prisoner further insisted, that the taunts and reproaches to which he was repeatedly exposed from idle boys, who came to the door or passed by the window of his gaol, tended to keep up in his mind, an excitement unfavorable to the return of cool reflection. But the remarks made by him in any such moments of irritation, were not the confessions which were proposed as evidence on the part of the state, and whose admissibility are under consideration. And however he may have been led to reply harshly to remarks, equally harsh and thoughtless, to answer the fool according to his folly, it does by no means result, that the same temper would be felt towards the numerous, and some of them very respectable persons, with whom he conversed, and in a manner apparently serious and deliberate, related the melancholy tale. The idea that

Sept. 1828.

State
v.
Guild.

he saw in every person who approached him, an enemy, and therefore persevered in an avowal of the crime, is far more fanciful than just. Even a child would be prompted to silence in the presence of one whose hostility he knew or believed. If any thing escaped, the remarks would be few, even if harsh; but for such a person to avow a crime, to relate its most minute details, to expose himself thereby, as he was repeatedly assured, to imminent danger of the most severe punishment, and the whole story to be a total falsehood, is inconsistent with nature and repugnant to credibility.

Upon a careful view, then of the circumstances of the case, we find no reason to disapprove of the conclusion in point of fact, which was drawn by the court, or to doubt of the propriety of their determination, to submit these confessions to the consideration of the jury; and, the more especially, as the court gave to the prisoner the advantage of a review of these facts, by the jury, and expressly charged them, that "it was their business to consider the confessions with reference to the manner in which the first confession was obtained, and if they were not satisfied that the latter confessions were made freely and understandingly, and wholly free from any expectation of benefit, raised by the hopes and promises preceding the first confession, or from his continuing to tell an uniform story, it was their duty to reject them from their minds and not to make them the foundation of their verdict."

It may not be without utility here to speak a word on a topic, briefly adverted to by the counsel at the bar, whether the admissibility of confessions objected to as improperly obtained, should be decided exclusively by the court, or should be submitted to the jury, to consider the question of fact and to reject or weigh them accordingly. The practice of the courts of criminal judicature on this head has not been altogether uniform. *Hawkins, book 2, ch. 46. sect. 36*, says, a confession obtained by the flattery of hope or the impression of fear, is not admissible evidence. In *Rex v. Woodcock*, *Leach* 4th edition 500, *Chief Baron Eyre* admitted declarations of a deceased person, and left it to the jury to consider, whether the deceased was not in fact under the apprehension of death, though she did not seem to expect immediate dissolution; and said if they were of opinion she was, the declarations were admissible, and, if of a contrary

Sept. 1828.

State
P.
Gould.

opinion, they were inadmissible. In *Rea. v. Hucks*, 1 *Starkie*, N. P. 521, Chief Justice *Ellenborough* said, that upon a question proposed to the judges there, by the judges in Ireland, who entertained doubts on the subject, they were unanimously of opinion, that when a declaration had been made by a party in *articulo mortis*, whether under all the surrounding circumstances the declaration was admissible in evidence, was a question exclusively for the consideration of the court. In the cases, in the Mayor's Court of New-York, above mentioned, the question of fact was submitted to the jury. In *Aaron's case*, 1 *South*. 240, Chief Justice *Kirkpatrick* said, "If the confession however, rested upon the ground of hope and fear alone, doubtful as it might be, I should have been inclined to yield to its competency, and to leave it to the discretion and judgment of the jury." In many cases, both in this state and in our neighbouring states, courts have wholly rejected confessions, when clear and unequivocal evidence of undue influence was discerned. It is unnecessary however, for the sake of the present case, further to pursue this subject, for if the decision should be made by the court, such decision was made; and if proper for the jury, it was submitted to them, in the most free and unbiassed manner. Of the opinion of both court and jury, on this point then, the prisoner enjoyed the advantage.

We are now to examine, under the request of the Court of Oyer and Terminer, whether the evidence in the case was sufficient, in legal contemplation, to warrant the conviction of the prisoner.

In the first place, it is insisted by his counsel, that a verdict ought never to be founded on naked and uncorroborated confessions; and to support this position, they have in a great measure relied on the opinion expressed by Justice *Rossell* in *Aaron's case*, 1 *South*. 242, "that no person indicted for a capital offence shall be convicted on his own confession, without a single circumstance to corroborate it." If the learned judge is to be understood to mean, when the *corpus delicti* is not otherwise proved, as when in larceny no proof is given of the taking of the goods, or in murder, the fact of the death is in no wise shewn, and when the whole case depends on the mere confession of the accused, a number of cases will be found to support the doctrine. But if he is to be understood, that even when the *corpus delicti* is otherwise established, the confession of the

Sept. 1828.

State
v.
Gould.

prisoner alone is not sufficient, if the jury believe it to be true, to produce a conviction, the opinion stands opposed to very high authority. The only case referred to by the judge, is from *Leach's crown law* 320, Alexander Fisher's case. This citation was evidently made from the first edition of *Leach*, and *Justice Heath*, on a trial at the assizes, is there reported to have laid down the rule in substance as above stated. But Fisher's case, was mis-reported by *Leach* in that edition, and is one of the many errors, which he says in the preface of his subsequent editions, that he has corrected. In the 4th edition published in 1815, vol. 1, page 311, the same case is to be found, and the point decided, as there reported, is wholly different. "There was no other evidence," says the Reporter, "to fix these facts upon the prisoner, than his confession made on his examination before the committing magistrate, and there being no evidence, that this confession was not reduced into writing, *viva voce* testimony of it was rejected." In the same page, *Leach* reports the case of John Wheeling, tried before *Lord Kenyon*, at the summer assizes at Salisbury 1789, in which it was determined that "a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence."

Hawkins, book 2, ch. 46, s. 36, says—"If a confession be voluntarily made, and regularly proved on the trial, it is sufficient if the jury believe it to be true, to convict the prisoner, without any corroborating evidence to support it." *Phillips* in his treatise on evidence, says, "a free and voluntary confession, made by a prisoner to any person at any time or place, is strong evidence against him, and, if satisfactorily proved, sufficient to convict, without any corroborating circumstance." 1 *Phil. Ev.* 81. And afterwards he says: "It appears now to be an established rule, that a full and voluntary confession by the prisoner of the overt acts, charged against him on indictment for treason, is of itself sufficient evidence to warrant a conviction." *Ibid.* 85. *Starkie* says, a "prisoner may be convicted on his own confession without other evidence." *Starkie Evid.* part 4, page 53. An opinion on this point need not however, be here expressed, nor need the enquiry be further prosecuted, for it will, I think, be demonstrated, in the sequel, that the confessions are "strong and pregnant," "disclosing and bringing forth facts and circumstances," and

that there are circumstances corroborating these confessions of a peculiarly pointed and persuasive character. In the first place, however, it becomes material to a correct understanding of the subject, to settle what is meant by the qualification, "corroborating," annexed to the term "circumstances." The phrase clearly does not mean facts which, independent of the confession, will warrant a conviction, for then the verdict would stand not on the confession but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness, is said to be corroborated, when it is shewn to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. Corroborating circumstances then, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such in short as may serve to impress a jury with a belief of its truth. In this view of the subject, the evidence in this cause affords circumstances corroborating, in a singular and remarkable manner, the confessions which were proved. I shall briefly state them. The prisoner said, he went to the house of the deceased, for the purpose of borrowing a gun. It was proved a gun had been kept there, and that the prisoner knew it. He said she refused him the gun, and accused him of having done mischief to her pig and pigeons. It was proved that she had entertained a belief, that such mischief had been done by him. He confessed he had struck her with a yoke. The witness, who first saw her after the disaster, testified that he found a yoke and blood on it lying near her. The prisoner confessed that, as he was going out, after she had refused his request, he saw the yoke *by the door*, picked it up and went back. Jonathan Vankirk, who resided in the house, testified to the jury that when he went out about noon to work, the yoke was by the side of the door. The prisoner stated that she was on the hearth. M'Coy, the first who saw her, found her lying in the corner of the fire place. He stated that she was starching a cap. A cap, says M'Coy, lay on the hearth by the side of her. To Philip Knowles he related the story, and confessed he struck her a first, second, third, and fourth time. M'Coy testified there were four wounds—one on the top of her head, one on the right temple, one on the right eye, and one on the under jaw. The minute detail of incidents and the steady uniformity

Sept. 1828.

State

Guild.

Sept. 1828.

State
v.
Gaild.

of his relations to a number of persons, are not among the least striking of the circumstances which mark these confessions. One supposed discrepancy only has been observed or pointed out. To one of the witnesses he said, the deceased was sitting by the fire, blowing the fire. To another, that she was starching a cap and stooping down on the hearth. No difficulty however, seems to exist in reconciling these representations by supposing that he spoke of different points of time.

In this view of the case, a most marked difference from that of Aaron, on which the prisoner's counsel placed much reliance, cannot escape observation. No attending circumstance stated by him was proved to have existed; and although before the coroner's inquest, and for three or four weeks after he was put in gaol, he continued to make the confessions, yet afterwards, and until the time of trial, he steadily denied the truth of what he had confessed.

In the charge to the jury the court say, "there are some coincidences between the facts detailed in his confession and the real state of things, as testified by other witnesses; these would be strong proofs of guilt, if he could not have learned them from any other means, except by having gone to the house and seen the body and other things as they really were. But his confessions were made long after, there were other sources of information, and if you think it probable, or possible, that it was furnished from other sources, the evidence arising out of these coincidences will have but little weight." In this passage, as well as in every other part of a very judicious charge, we see the cautious and humane intentions of the judge, that on so deeply important an occasion, no proper considerations should be overlooked by the jury, and that every thing which might justly have weight *in favorem vitæ* should be presented to their view. These considerations were earnestly urged before us by the prisoner's counsel. But that a youth, like the prisoner, should carefully treasure up from time to time the fragments of information which he might have heard; that he should weave them together into a connected and consistent tale; that he should uniformly and repeatedly relate them, and in the same manner, and all this, not as an avowal or argument of innocence, but as a declaration of atrocious guilt, was, in our opinion, very properly considered by the jury to be beyond all reasonable bounds of credibility. And it

could not have escaped their observation, that in no particular, not even the slightest, was his confession contradicted, or found inconsistent with the facts or in any wise disproved.

Sept. 1822.

State
" Guild.

The age of the prisoner was earnestly pressed on our consideration by his counsel, who strenuously insisted he was too young to be exposed to punishment on such evidence. At the perpetration of the offence he was aged twelve years and somewhat more than five months. The sound, sensible and legal rule on this head is, in our opinion, judiciously, as well as lucidly, stated by *Justice Southard* in the case of Aaron. "This capacity," says he, "to commit a crime, necessarily supposes the capacity to confess it. He who is a rational and moral agent, and can merit the infliction of legal sanctions, must be able to detail his motives and acts, and must be judged by them. If therefore the defendant was of an age to be punished, he was of an age to confess his guilt." These principles are conformable to the most approved and respected authorities. In *Leach's Edition of Hawkins, B. 1. C. 1. page 1, in note*, it is said, "from this supposed imbecility of mind, the protective humanity of the law will not, without anxious circumspection, permit an infant to be convicted on his own confession. Yet if it appear, by strong and pregnant evidence and circumstances; that he was perfectly conscious of the nature and malignity of the crime, the verdict of a jury may find him guilty and judgment of death be given against him." *Blackstone* says, "in very modern times, a boy of ten years old was convicted on his own confession, of murdering his bed fellow, there appearing in his whole behaviour plain tokens of a mischievous discretion, and as sparing this boy merely on account of his tender years, might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes, with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment." 4 *Bl. Com.* 23. The case mentioned by *Blackstone* is reported at large by *Foster*. The evidence was the confession of the boy, with some circumstances tending to corroborate the confession, but in one respect widely different from the present case, for one, and a leading circumstance, which he stated was found to be entirely untrue. *York's case, Foster* 70.

In regard to a youth of the years of the prisoner, the law most wisely requires the utmost circumspection from the jurors; and

Sept. 1828.

State
v.
Edsall.

it is satisfactory to find that in the present case the jury were distinctly reminded of their duty. "This fact," says the judge in his charge, "should make you more cautious in admitting the confessions and induce you to resolve your doubts in his favor."

Under a deep sense of responsibility, after a careful deliberation, and feeling the strongest impression of the tenderness due to the life of a fellow creature, we hold ourselves bound to advise the Court of Oyer and Terminer not to grant a new trial, but to proceed to discharge the solemn duty which remains to them, by pronouncing the sentence of the law on the crime of murder.

The prisoner was sentenced and executed.

THE STATE *against* BENJAMIN HAMILTON, LATE SHERIFF, AND JOSEPH E. EDSALL, AND OTHERS, SURETIES.

1. A notice to assess damages, upon a judgment entered upon a sheriff's bond, is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for the defendants in the suit on the bond.

2. Such notice may be given by any attorney selected by the parties interested in obtaining the assessment, though such attorney was not the one employed in the original suits on which the assessment is to be made.

3. It is not necessary to assign breaches on the record, after a judgment by default on a sheriff's bond.

A JUDGMENT by default having been obtained in this court, in May term last, on a sheriff's bond, against the late sheriff of Sussex, and his sureties—

W. Halsted, now moved for leave to assess, as damages under that judgment, the amount of several amercements obtained against the late sheriff in the Court of Common Pleas of the county of Sussex, and in the Supreme Court; and offered to read a copy of a notice of this motion, which had been duly served upon the late sheriff and his sureties.

Scudder, for the defendants, objected I. To the notice. 1. Because the attorney by whom it was signed, was not the attorney in the original suits on which the amercements against the sheriff had been obtained.

2. Because the notice was not served upon the attorney of

the defendant who had entered his appearance to the suit, in this court, previous to the entry of the judgment by default, and who ought to have been served with notice of this motion, instead of the late sheriff and his sureties.

Sept. 1828.

State
v.
Edsall.

II. He objected that no damages could be assessed under this judgment, upon the sheriff's bond, until breaches had been assigned upon the record, and cited 1 *Saund.* 58 note 1; *Rev. Laws* 238, sec. 9, 10.

Halsted, replied, 1. As to the notice. I. That it was not necessary that it should be made by the attorney in the original suits in which the amercements against the sheriff were obtained. Because those suits were at an end, and this was a new proceeding in which the parties interested were at liberty to employ another attorney. It was analogous to the suing out a writ of *scire facias*, to revive a judgment which might be done by a different attorney from the one who obtained the judgment; and that even an execution might be issued by a different attorney from the one who obtained the judgment.

2d. That the notice was properly served upon the sheriff and his sureties instead of the attorney of the defendants in the suit on the bond.

II. As to the assignment of breaches, the practice had been long and well settled, that an assignment of breaches upon these bonds was unnecessary.

CH. JUSTICE. As to the notice, it was properly given by the attorney *J. S. Halsted*. It was not necessary to be given by the attorney in the original suit. The parties interested may employ the same, or a different attorney to move for an assessment upon the sheriff's bond.

The notice was also properly given to the sheriff and his sureties, and it would not have been proper to have given it to the attorney; this is a new and substantial proceeding after the determination of the suit. This point was decided in a case recently before us from Somerset. In *Flommerfelt v. Zellers*, 2 *Halst.* 31, an application was made for an attachment against a person, who disobeyed a rule to stay waste. The notice was given to the party, against which an objection was raised, but the court said it had been properly given.

As to the assignment of breaches upon the record, it is the

Sept 1838.

Den
v.
Smith.

uniform practice to assess the damages in this way. No instance can be found of an assignment of breaches upon sheriff's bond.

FORD, J. As to the assignment of breaches, it appears to me that the breaches have been sufficiently assigned by the notice given to the defendant and his sureties.

Assessment ordered.

DEN *ex dem.* THOMAS PETERSON, DODO PETERSON, JOSIAH SPARKS AND WIFE, AND OTHERS *against* JOHN BOQUA AND DAVID SMITH.

This court will not order the plaintiffs to give security for costs upon the ground that but one of the plaintiffs resides in this state, and that he had several years before the commencement of the suit taken the benefit of the insolvent law.

A. L. EAKIN, In behalf of the defendants produced an affidavit showing that all the lessors of the plaintiff, except Josiah Sparks and wife, are residents of the states of Pennsylvania and Delaware, and that Sparks was insolvent, and had been discharged under the insolvent laws in 1820; and thereupon moved that the proceedings in the cause be stayed, until security be given for the payment of costs. It was contended that although the case did not come within the words of the statute, yet that it was within the equitable principles by which the action of ejectment is regulated.

F. L. Maccullagh, for the plaintiff. Although Sparks, one of the plaintiffs, may have been insolvent in the year 1820, yet he may be perfectly solvent at this time. The affidavit does not bring the case within the statute, and at this stage of the cause an ejectment is not within the especial control of the court, but is to be governed by the same rules as other actions.

G. D. Wall, replied.

BY THE COURT. The fact of insolvency, if we are authorised to extend the provision of the statute, on principles of equitable construction, is not sufficiently made out. Though insolvent in 1820, the time to which the affidavit relates, Sparks may be quite otherwise in 1827, when this suit was commenced. In a case reported in *Penn. Rep.* 866, this court overruled an application for security for costs, one of the several lessors of the plaintiff, being a resident in the state.

Motion overruled.

CASES
DETERMINED
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
State of New-Jersey,

NOVEMBER TERM 1823.

10	193
62	22
10	193
62	564

DEN ex dem. GREEN AND GREEN against STEELMAN AND OTHERS.

A purchaser of lands at sheriffs' sale, has not, previous to the making and delivery to him of the sheriff's deed, for said lands, such an interest therein as can be levied upon and sold by virtue of a *feri facias de bonis et terris*.

A sheriff's deed takes full effect only from the time of delivery, and does not relate back to the time of sale, so as to sustain an intermediate sale and conveyance by the sheriff, of the lands therein mentioned.

A levy may be made on lands acquired after the date of the judgment, or conveyed to other persons before the date of the execution.
Per Drake justice.

L. Q. C. ELMER and D. Elmer, for plaintiff.

— **Sloan and Armstrong,** for defendant.

EWING, C. J. In this action of ejectment, both parties claim under Samuel Clement, who as both acknowledge, became seized of the premises in question, on the 20th day of June 1818. The plaintiff shews a conveyance in fee simple, from Samuel Clement and wife, to David Jones, dated July 22d 1818, and a deed of mortgage, dated 24th February 1819, from David Jones to his lessors; and thus establishes a *prima facie* title.

The defendants, deduce title in the following manner: Judgment on bond and warrant of attorney was entered up on the 21st September 1816, in the Court of Common Pleas of the county of Gloucester, in favor of Joseph C. Swett, against Sam-

B b

Nov. 1828.

Den
v.
Steelman.

uel Clement. In June term 1820, this judgment was revived upon *scire facias post annum et diem*, and a writ of *fiery facias de bonis et terris* was issued thereon, returnable to the ensuing term of October, was delivered to the sheriff on the 26th day of June 1820, and was levied upon the premises in question. On the 21st August 1821, the sheriff made sale of the premises to Joseph C. Swett, the plaintiff in the execution, and executed and delivered a deed to him, on the 28th November 1826, after the commencement of this action. A few days after the above mentioned sale was made by the sheriff, a judgment was entered up in the same court, on the 7th September 1821, against the said Joseph C. Swett, in favor of Wm. Rudderow, and an execution of *fiery facias de bonis et terris* was delivered to the sheriff, on the 25th Sept. 1821. By virtue of this execution, the sheriff made sale of the premises in question, on the 6th day of August 1825, and executed and delivered a deed on the 22d day of the same month, to Thomas Redman and David Vanderveer, under whom the defendants claim by apt conveyances.

From this view of the case, it is seen that the defendants claim title through a sale and conveyance of the premises by the sheriff, under a judgment and execution against Swett. When this execution was delivered to the sheriff, and when the sale and conveyance were made by him, the only title, if any, which Swett had to the premises, was, that the premises had been struck off to him at sheriff's sale; the deed to him by the sheriff not having been made until long afterwards.

The defendants then have no valid title to the premises, unless the deed from the sheriff to Swett, when executed, relates back to the time of the sale, and takes full effect from that period, or unless after the sale and prior to the deed, Swett had such an interest in the premises, as was liable to be seized and sold under execution.

In the examination of the first of these topics, it is not necessary to enquire, whether there be any purpose for which the deed might relate to the sale, we are to ascertain whether it may so relate, as to sustain the intermediate sale and conveyance by the sheriff; and to such extent only, are my remarks intended and my conclusion to reach.

The language of the legislature, in the 12th section of the act making lands liable to be sold for the payment of debts, leaves

Nov. 1828.

 Den
 v.
 Steelman

little scope for doubt or difficulty on this head. The sheriff shall make to the purchaser, "as good and sufficient a deed or conveyance for the lands, tenements, hereditaments and real estate so sold, as the person against whom the said writ or writs of execution were issued, might or could have made for the same, at, or before the time of rendering judgment against him or her; which deed of conveyance shall transfer to, or vest in the said purchaser as good and perfect an estate to the premises therein mentioned, as the person against whom the said writ or writs of execution were issued, was seized of, or entitled to, at, or before the said judgment; and as fully to all intents and purposes, as if such person had sold the said lands, tenements, hereditaments and real estate to such purchaser, and had received the consideration money, and signed, sealed and delivered a deed for the same." By this provision it is seen, the transfer of the title and estate is to be made by the deed; the deed is to vest the estate in the purchaser. Neither the sale by the sheriff, nor the payment of the purchase money are contemplated by the legislature, as having any influence in passing the estate. It seems then, an obvious and very safe conclusion that until the act is done, which the legislature have prescribed as the mode whereby the estate is to be transferred, a transfer is not made, and that the estate cannot vest at an earlier period than the act done whereby it is to be vested, in the absence of any expression in the statute, which seems in any wise designed to give to the deed an earlier operation or efficacy. Had the legislature intended an earlier operation, we might expect to have found a provision that the deed should, from the time of the sale, or from the payment of the purchase money, vest the estate in the purchaser. But as nothing of the kind is contained in the statute, as no retrospective operation is in terms given to the deed, as the deed is to vest the estate, the just conclusion is, that the legislature intended that the estate should vest at the execution and delivery of the deed and not earlier, at which time, on general principles, a deed takes effect.

In giving this construction to the statute which seems so plainly to have been designed, there is no collision with any of the principles of common law, in respect to the relation of deeds; on the contrary, it is in conformity with them; and such conformity ought always to be weighed in the construction of a statute.

Nov. 1828.

Don.
v.
Steelman.

If the statute affords a rule, from its transcendent force it must prevail; otherwise, the rule is to be sought in the doctrines of the common law.

"There is," says *Lord Mansfield*, in *Vaughan v. Atkins*, 5 Burr. 2764, "no rule better founded in law, reason and convenience, than this, that all the several parts and ceremonies necessary to complete a conveyance, shall be taken together as one act, and operate from the substantial part by relation. The formal effectuates the substantial part, and therefore must relate to it." What then in this case is the substantial part? The purpose to be effected is the transfer of the estate. Now the legislature, after providing that notice of the sale shall be given; that a public vendue shall be made, and the lands struck off to the highest bidder, have declared that the transfer shall be made by the deed. It necessarily follows then, that in making the transfer, the execution and delivery of the deed, is the substantial part. From that part then, according to *Lord Mansfield*, the whole must operate. To that act the rest must relate. *Viner*, lays down the rule with respect to relation, in somewhat different language. "Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation." 18 *Viner*, tit. *Relation*, s. 8. It would not perhaps be unprofitable to enquire whether, when the legislature have declared, that the conveyance and estate shall be made by the deed, the antecedent sale, or striking off by the sheriff, comes within the scope, or is one of the "divers acts concurrent," meant in this passage. But taking it to be so, it is to be presumed the rule is laid down by *Lord Mansfield*, in a more clear but not in a different manner, and that the same idea should be attached to the term, original, as to his, more explicit word, substantial, and this conclusion will seem the more sound when it shall appear in the sequel, that if *Viner* means by the original, the first act in order of time, he is contradicted by adjudged cases reported in the English books. And these cases also establish another principle, of vital importance in its application to the case before us. Where the person making the conveyance has an estate in the lands, relation may be had to the substantial part of the conveyance; but where it is made by one, having no estate, but a power or authority only, the estate does not pass until all the requisite acts are completed, and from the last

Nov. 1828.

Den
v.
Steelman.

to the first there is no relation so as to sustain an intermediate transfer. The statute of 27 *Hen. 8, ch. 16*, for enrollments, requires a deed of bargain and sale, whereby any estate of inheritance or freehold shall be made, to be enrolled within six months, and enacts that the lands, &c. shall not pass except the same be enrolled within that time. It has however, been held, that if a deed made by a person seized, be enrolled within the six months, the land passeth from the delivery of the deed; and although after the delivery and acknowledgment, either bargainor or bargainee should die; for when the deed came to be enrolled, the bargainee in judgment of law was seized from the delivery. 2 *Inst.* 674. *Mallory v. Jennings*. A different rule however prevails, where the sale is made by commissioners of bankrupts; an instance more analogous than the former to our sheriff's sales. In the case of *Perry v. Bowes*, reported in 1 *Ventr.* 369, and *Jones* 196, the commissioners of bankrupts had assigned the lands in question to the lessor of the plaintiff by deed of bargain and sale, which was afterwards enrolled; the statute of bankrupts, 13 *Eliz. ch. 7*, directing the commissioners by deed indented, enrolled in one of the Queen's Majesty's courts of record, to make sale of the lands, tenements and hereditaments of the bankrupt. This action was brought after the enrollment, but the demise was laid of a day subsequent to the delivery, and prior to the enrollment; and the question was, whether that was sufficient to entitle the plaintiff to recover. On the part of the plaintiff it was argued, that after the deed was enrolled, it should relate to the delivery, and it was compared to a bargain and sale, where, by the statute of *Henry 8*, when the deed is enrolled it relates, and if the bargainee sells before enrollment, the subsequent enrollment makes it good. But the court said, that the commissioners had no estate, but solely a power given to them by the statute of bankrupts which ought to be executed in the manner prescribed by the statute with the circumstances it directs, which is not only by deed indented, but enrolled likewise; and they must execute the power, in all circumstances, before it can become effectual, and the court holding that the deed did not relate so as to sustain the intermediate lease, rendered judgment for the defendant. *Preston* in his *Essay on abstracts of title*, says, "While a bargain and sale by the commissioners of bankrupt, operates only from the time of enrollment, other bargains and sales operate either in

Nov. 1829.

Den

Steelman.

fact or by relation from the time of their execution. 1 *Prest.* 168. And he gives the reason. "As commissioners have an authority only and not an estate, no estate will vest under the bargain and sale until enrollment." *Ibid* 171. He farther says, "till the assignees have an estate under a deed indented and enrolled, they cannot communicate a legal title to a purchaser. *Ibid* 172. "Under bargain and sales from commissioners of bankrupt, no estate passes till enrollment. The commissioners have only an authority to sell by deed, indented and enrolled. No estate is in them, and their authority is not exercised till all the circumstances under which it is to be performed are complete." *Ibid* 289. In the late case of *Doe v. Mitchell*, the demise was by the assignees of a bankrupt, and was laid after the date of the commission, but before the general assignment, and also before the bargain and sale by the commissioners to the assignees. The plaintiff was nonsuited on the trial, and moved to set aside the nonsuit on the ground that the bargain and sale, when executed, related to the act of bankruptcy, and so the demise which was after the commission, and of course after the act of bankruptcy was said to be well. The court enquired, "if there was any authority extending the doctrine of relation to the conveyance by the commissioners of the bankrupt's freehold; for without some authority, they said it would be going too far, to carry it to that extent; and no authority being cited they said it remained in the bankrupt, though not beneficially, until taken out of him by conveyance." The analogy between these cases and a sale by a sheriff is very obvious. In real estate, levied on by execution, the sheriff has no kind of interest or estate. Unlike chattels, of which he may take possession, and in which he acquires a species of property, sufficient in certain circumstances to sustain an action, he could not enter into possession, nor prosecute, if the defendant in execution should be ousted, or if injury should be done by waste or spoliation. He has a power or authority given to him by the statute to be executed. He has no title in himself but is the instrument of the law to transfer the title. Hence like the commissioners of bankrupts, having no estate in himself but an authority only, the freehold remains in the defendant, no estate passes to the purchaser until all the circumstances are completely performed, until the deed whereby the law says, the title is to be transferred shall have been executed and delivered. In case of

Nov. 1828.

Dea
Steelman.

ordinary persons the deed may relate, because the grantor had an estate in him, but not so with respect to the sheriff. In respect to him the ground on which the relation is sustained does not exist. And this consideration furnishes an answer to the argument, drawn from the supposed analogy to the operation which a deed sometimes has, by relation to the time of the contract for the purchase of the land, so as to render valid an intermediate disposition of the land by the grantee. But there, the grantor has the whole estate in him at the time of the contract, a plain principle of equity regards him as a trustee, at least from the time he receives the purchase money; and the grantee having made the conveyance, is not, nor are those claiming under him, permitted to question the conveyance he has made. An argument of some force at least upon the first view of it, to give the same relation to the deed of the sheriff as to that of an individual, is drawn from the words of our statute already mentioned, "and as fully to all intents and purposes, as if such person had sold the said lands, tenements, hereditaments and real estate to such purchaser, and had received the consideration money and signed, sealed and delivered a deed for the same." But the argument claims too much force for these words; and far beyond the intention of the legislature. They were meant to shew the nature of the estate to be conveyed, "as good and perfect an estate as the defendant had;" the time at which the nature of the estate should be fixed, "at or before the judgment," so that no subsequent lien or alienation should have effect; and as the deed was not to be made by the defendant, but by the officer having no estate, to shew that the deed thus made should vest in the purchaser, the estate of the defendant held by him at the judgment as completely as if the conveyance had been made by the defendant himself. The effect of the deed to convey, was alone designed in this clause. Its relation, if it should have any, was left to the regulation of the principles of the common law. In the consideration of this subject, it should not be overlooked that our sheriff's sales, are, or rather may be, always for cash, so that a purchaser may, at all times without delay, obtain his deed and acquire his title.

In order to establish the doctrine of relations as contended for on the part of the defendant, and to shew that it should operate so as to sustain his title, two cases are cited from the Su-

Nov. 1828.

Den
v
Steelman.

preme Court of the State of New-York. *Jackson v. Dickinson*, 15 *Johnson* 309; and *Jackson v. Ramsay*, 3 *Cowen*. 75. But these cases, notwithstanding some general expressions, which however, ought always to be understood with reference to the subject under consideration, do by no means carry the doctrine of relation to the extent requisite, for the support in the present case of the defendant's title. In the first case the question was, whether a purchaser of premises subject to a mortgage at sheriff's sale, on the first of March, whose deed was not executed until the 19th, was precluded from contesting the validity of the mortgage, by a decree of foreclosure upon a bill in Chancery, filed on the 10th of the month, to which he was not a party. In the latter case, a sale was made by the sheriff under execution, against one Mr. Michael. Sometime afterwards he departed this life. No deed being made by the sheriff, the devisee of Mr. Michael, brought an ejectment against the purchaser who had gone into possession. Before the trial, a deed was executed to the purchaser, and the court held that this deed, against the heir, who had in fact no better rights than the original defendant, was an available defence. In neither of these cases was the validity of an intermediate sale or conveyance by the purchaser, or the divesting of his interest against his consent, and by the intervention of legal process, brought into view. But another consideration clearly proves, that these cases ought to have no weight here. The law of the state of New-York, under, and in reference to which they were decided, is essentially different in the point now under examination, from our statute for the regulation of sheriffs' sales. The statute of New-York, (1 *Rev. Laws, N. Y.* 392, *edition* of 1807) does not prescribe or direct the making of a deed by the sheriff. It requires an advertisement and sale at public vendue; but as to any deed or conveyance by the sheriff is totally silent. Hence, it became a serious question in New-York, whether the sale at vendue was not sufficient to pass the title, and whether a deed from the sheriff to the purchaser, was at all necessary for that purpose; and it was not until the case of *Simonds v. Catlin*, 2 *Caines* 62, that the question was settled by judicial determination; a deed was then held necessary; but it is to be remarked, not because the act regulating sheriffs' sales prescribed it, but because of the general terms of their statute of frauds requiring, like the English statute, a deed or note in

Nov. 1828.

Den
Steelman.

writing to pass an interest in lands, and because, in some measure, as it would seem from the argument of the court, of the propriety, policy and convenience of a conveyance by deed. But by our statute as it has been already mentioned, a deed to be made by the sheriff is not only expressly required, but is indispensable; and is the very act whereby the estate is to be transferred to and vested in the purchaser. In *Jackson v. Dickinson*, the court said, "the subsequent delivery of the deed being *mere matter of form*, must have relation back to the time of the purchase at sheriff's sale." The court then considered, and doubtless very properly since their statute did not require it, the deed as the formal part of the transaction, and hence the conclusion drawn by them was in accordance with the rule stated by *Lord Mansfield*, that the formal part, or the deed, must have relation to the substantial part or the sale. I trust I have shewn that our statute has given the converse characters to these parts; and hence the rule of relation does with us apply in a different manner.

Upon the whole I am satisfied that the title of the defendants cannot be supported by the doctrine of relation; that the deed executed and delivered by the sheriff in 1826, cannot relate to and operate from the sale in August 1821, nor thereby give title to Swett, in such manner as to support the levy under the execution against him, in September 1821, and the sale and conveyance of the sheriff in August 1825.

The question then remains, whether in September 1821, or August 1825, after the sale, and prior to the deed, Swett had such an interest in the premises as was liable to be seized and sold under execution. The solution of the first inquiry extends in a great measure to determine this question. For it is clear that at the proposed period, Swett had no legal estate in the premises; nor can he even now be considered as having had a legal estate at that time, unless by relation. And it is also clear, there is no ground to presume, that Swett was then in actual possession of the premises. It was indeed insisted by the defendant's counsel, that as they are in possession, and were when this action was brought, and as they claim title under Swett, the legal presumption is, that they received from him a possession which he had previously held. For such an inference there would perhaps be somewhat more reason if the defendants claimed by, or had received, a direct conveyance from Swett. In

- Nov. 1823.

Dea
v.
Steelman.

the absence of any proof as to possession, it may sometimes be presumed to be in him who has the legal title. But Swett had no legal title, when the defendants went into possession, nor until since the commencement of this suit. The presumption then on this ground is wanting, and so therefore there is no proof either from direct evidence or legitimate presumption, that Swett had possession at the levy and sale. It was indeed said by the defendant's counsel, that a deed had been given by the sheriff in August 1821, but for themselves they repudiated that deed; they did not give it in evidence, nor profess to claim under it. It was produced by the plaintiff; no judgment or execution was offered to sustain it, and upon looking into it, the execution which it recites commands the sheriff to make the debt and damages of the lands, whereof Clement was seized in June 1820, and does not therefore affect the premises in question, which had been conveyed by him to Jones, in July 1818. It was indeed surmised that the recital was a mistake, and the deed really designed for the same purpose, as that of November 1823; but of the alleged mistake no evidence is given, and we are therefore to read the deeds as their contents purport.

At the time then of the levy and sale under the execution against Swett, the case stood thus: The premises had been struck off to him by the sheriff at public vendue. If he had paid the purchase money, or whenever he did pay it, he had a right to call on the sheriff for a deed; which, the conditions of sale being fulfilled, a court of equity, and perhaps the court out of which the execution issued, would have compelled the sheriff to make. At most he had an equitable interest, but such an interest could not be the subject of levy, sale, and conveyance under execution. Of such an interest he was not seized, in the meaning of the clause of the act of the legislature, which thus defines the real estate whereon the execution may be levied. In *Jackson v. Scott*, 18 John. 94, it was held that a possession under a contract for purchase was an interest in land, on which there might be a levy. But the possession was the principal ingredient, the groundwork of the levy, and without it the interest would not have been sufficient. We have decided, say the court, that a mere equitable interest cannot be sold on execution, but if connected with the possession of the land, the legal interest, of which the possession is evidence, may be sold. The purcha-

Nov. 1828.

Dea
Steelman.

ser acquires all the debtors' legal rights, and possession is a legal right. In 2 *John. Ch. Rep.* 312, *Chancellor Kent* said, "a mere equity is not within the reach of process at law. I do not know of any case in which a court of equity has considered an execution at law as binding an equitable right. The idea is altogether inadmissible." In 1 *John. Ch. Rep.* 56, the same *Chancellor* thus describes the subject of execution at law: "There must be either a real estate or an interest known and recognised at law, or an equitable title within the purview of the provision in the statute of uses to which I have alluded, or an execution at law will not reach it. A judgment at law is not a lien, on a mere equitable interest in land, and the execution under it will not pass an interest which a court of law cannot protect and enforce." And just before, the *Chancellor* had said in reference to the statute of uses: "If the contract had been fulfilled so that *Smith* had been entitled to a deed, when the judgment was obtained, and sale made, the statute might have applied." The provision of the statute of uses in New-York, to which the *Chancellor* refers, is contained in the 4th section of the act concerning uses, *N. Y. Rev. Laws* 68, and authorises the seizure of lands held in trust on a *fiery facias* against the *cestui que* trust. But in this state we have no similar enactment. Laying aside then that clause of the *Chancellor's* proposition, and the interest of *Swett* in the present case is not comprehended in either of the other clauses, for it was neither real estate, nor an interest known and recognised at law. But if we had a similar clause in our statute, or if an equitable interest might be levied upon and sold, it will have been observed that the *Chancellor* very properly makes it a prerequisite, that the contract should have been fulfilled, and the purchaser should have been entitled to a deed; and in truth it is presumed the most zealous advocate for the most liberal stretch of the execution, will not consider the interest of the purchaser sufficient until he has paid the purchase money. If this then be a sound rule, its application fully evinces the insufficiency of the interest of *Swett*, to be the subject of seizure and sale, for there is no evidence before us, that prior to the sale or conveyance by the sheriff under the execution against him he had paid the purchase money; nor indeed until the deed of November 1828. The deed of August 1821, although invoked by the counsel of the defendant, is for the reasons I have here-

Nov. 1828.

Den

v.

Steelman.

tofore suggested in respect to it, wholly inadequate for that purpose.

From this view of the case, the conclusion in my opinion clearly results, that Swett had not at the sale and conveyance by the sheriff, an estate or interest in the premises liable to seizure and sale.

As the case does not in my apprehension, shew any valid title in the defendants, it is unnecessary to examine the positions assumed by the plaintiff's counsel, and so fully discussed at the bar, that the judgment against Clement was void for want of jurisdiction, and could not if valid bind after acquired lands *bona fide* aliened before execution.

Nor is it necessary to examine sundry questions, raised by the defendants on the trial and appearing on the state of the case, by way of objection to certain parts of the evidence and of motion for nonsuit, as these were expressly waived on the argument at the bar.

One point raised by the defendant's counsel remains to be considered. It was insisted, the plaintiff had failed to maintain the issue on his part, because he claimed under a mortgage given to secure the payment of a bond, and on the trial did not produce the bond but relied on the mortgage only. This point is not well taken by the defendants. The plaintiff having produced the mortgage whereby, as between the parties to it, the legal estate was conveyed by the mortgagor to the mortgagee, and it appearing the day of payment in the condition had passed, the mortgagee was not bound to produce the bond. The mortgage shewed a present estate, defeasible indeed on a condition—on a condition subsequent—and he who claimed the benefit of that condition was bound to shew that it had been fulfilled.

DRAKE, J. The first objection relied upon, in opposition to the title of the defendants, in this case, is, that the bond, on which the judgment was entered, in 1816, against Joseph and Samuel Clement, at the suit of Joseph C. Swett, is not a bond given for "the payment of money only" within the words and meaning of the statute, *Revised Laws*, p. 685; and that therefore the court had no authority to enter such judgment.

The principal part of the bond is in the ordinary form, for \$8000, and conditioned for the payment of \$3000, "with inter-

Nov. 1828.

 Den
 v.
 Steelman.

est from the date thereof, on or before the first day of March next." But it is added, "It is here understood that if Josiah F. Clement, does pay to Richard French, his executors, administrators, or assigns, the full amount of an obligation assigned to the said Richard French by the said Samuel Clement, for \$3000, with interest, from the date of the said obligation, on or before the first day of March next, then the above obligation to be void," &c. Now, this bond may be defeated by the payment of \$3000, directly to the obligee, or by the payment thereof to a third person therein named, and who held another security for the same sum. Still it is a bond for the payment of money only. It is not to be discharged by the performance of a duty, or service, or by doing any collateral act. Promissory notes and bills of exchange of this description have been adjudged not to be such within the custom of merchants; not because they do not comply with the requisite of being, *for the payment of money only*, but because they do not comply with another requisite, that is that they be *payable at all events*. A requisite equally important to these securities, as they are intended to circulate from hand to hand, and should not be incumbered with conditions, and liable to various modes of defeasance. But the same reasons will not apply in opposition to the entering of these summary judgments upon bonds. They have no protection in the hands of an assignee; and if improperly entered, the court will open or cancel them as equity may require. The legislature merely meant to guard against uncertainty, as to the amount originally stipulated to be payable. That it should be of a nature to be determined by calculation, and not embrace a case of unliquidated damages. This bond comes within the words of the act, and as it appears to me, within its proper and contemplated application. Upon this view of the subject, it will be unnecessary to inquire whether if the bond is not one contemplated by the act, the judgment would, for that reason, be wholly void.

Again, this judgment was entered on the 21st day of September 1816, before Samuel Clement, the defendant in the same, acquired title to the premises now in dispute. They were conveyed to him on the 20th day of June 1818; and on the 22d day of July of the same year, he conveyed them to David Jones; under a mortgage executed by whom the plaintiffs claim title. No execution was issued on this judgment, until after the lands

Nov. 1828.

Den.

v.
Steelman.

were again sold by Clement. The judgment was revived by *scire facias*; in June 1819, and a writ of *feri facias* was soon afterwards issued thereon, and levied on the premises in question.

Upon this state of facts, it is objected that the judgment was no lien on these lands, and that they should be held by a *bona fide* purchaser, clear of all incumbrance from the same. The 12th section of the act, making lands liable to be sold for the payment of debts, *Revised Laws* 430, favors this construction, but other parts of it, and particularly the 1st, 6th, and 13th sections, leave no room for doubt, in my mind, that the legislature contemplated that a levy might be made on lands acquired after the date of the judgment, or conveyed to other persons before execution. And the uniform understanding, and course of practice are so. An argument cannot fairly be drawn in favor of the contrary doctrine from cases of personal property. There the judgment does not bind at all. And the execution becomes a lien only after actual delivery to the officer, and then merely for a particular purpose; not to remain long an incumbrance on this fleeting property, but for the purpose of enabling the sheriff to levy on it before the return of the writ. And if he do not, the force of the execution is spent, and it does not remain a lien. But land is of a permanent nature. It is conveyed by deed duly executed and *recorded*. The title can be traced, and ordinary caution will enable a purchaser to examine it, and see through whose hands it has passed, and whether any of the owners have made a prior conveyance, or incumbered it by mortgage or judgment. Judgments are matters of public record. And as the lien is not of a secret nature, and cannot endanger the rights of the vigilant, I think the interests of justice, as well as the sound construction of the statute, require the extension of the lien of the judgment, so as to embrace this after acquired property.

The remaining question, agitated in this cause, is one of considerable difficulty. It arises upon the effect of the sheriff's deed to Swett, bearing date the 21st day of August 1821, the time of the sale, but really executed after the present action was brought, and after the second sale of the premises, when they were levied on and sold as the property of Swett, and purchased by the defendants. Had Swett, before receiving any deed from the sheriff, such an interest in the premises as could be levied on and sold? A mere equitable interest in a term of years,

Nov. 1828.

Den
v.
Steelman.

or other chattel cannot be sold on a *fieri facias*. 8 *East* 487. By the statute of *Westminster* 2, (13 *Edw.* 1.) c. 18, the sheriff may deliver to the plaintiff "a moiety of his (the debtor's) land." Under this statute, it was decided that a trust estate could not be extended. But by the 29 *Chs.* 2, c. 3, lands, &c. held in trust may be extended in the hands of trustees, for the debt of *cestui que* trust. By our act of assembly, *Revised Laws*, p. 431, sect. 5, an execution may be issued against the goods and chattels, lands, tenements, hereditaments, and real estate of the party against whom such judgment is, or may be, awarded. Words similar to those of the first English statute authorising the elegit, and liable to the same construction; and we may presume contemplated to be confined to cases of legal title, as the construction of the English statute; and the supplementary statute whereby trust estates were embraced, were well known; and if it shall be considered, that, as the debtor's property may possibly escape under this construction of the statute, it would be good policy to extend it to embrace trust estates, it is for the legislature to remedy the defect as the British parliament did. In the 6th section, prescribing more particularly the form and manner in which the execution shall issue, *the lands, &c. whereof the debtor was seised*, are authorised to be taken. Now a *seisin* always refers to a *legal* title. A person is never said to be seised of an equitable interest. It is a right at law either reduced into possession or not, and constituting either a *seisin* in deed or a *seisin* in law.

The cases of resulting trusts held to be bound by execution in the cases reported in 1 *Johnson* 45, and 3 *Johnson* 217, and others, to be found in their reports, depend upon a clause in the statute of New-York, by which the sheriff is authorised "to seize in execution all such lands, &c. as any other person or persons be, in any manner of wise seized to the use or in trust for him against whom execution is seized," &c. An equity of redemption can hardly be said to form an exception to this principle, as it has long been considered a legal estate; that the mortgagor in possession is real owner; and that the mortgagee has but a chattel, and notwithstanding its form, the mortgage is a mere security.

Upon this view of the case, the interest of Swett, being merely an equitable interest was not the subject of levy and sale un-

Nov. 1828.

Wood
v
Malin.

der the writ of *fiery facias* last issued. And if the legislature have refrained from making these equitable estates liable to execution, on account of the difficulties which often attend the acquiring of the legal title, and the consequent uncertainty of their real value, which would make them the subjects of mere speculation, and liable to be sacrificed for a trifling part of their worth, I am not disposed to do that *indirectly*, which they refrain from doing *directly*. I am not inclined to suffer an act done some years afterwards, to make that a valid levy and sale, which was not so when the sale actually took place, and when the bidders had to judge of the value of the property. I cannot adopt any doctrine of relation of the sheriff's deed of 1826, back to the time of the first sale which shall make good the second.

FORD, J. concurred.

Let judgment be entered for the plaintiff.

CHARLES WOOD AND JOHN W. WOOD *against* GEORGE W. MALIN.

10 208
51e 451

If a person is arrested in this state, upon a contract made in the state of New-York, where both plaintiff and defendant resided at the time the contract was made, he will not be liberated on common bail, notwithstanding he may have taken the benefit of the insolvent law of the state of New-York, subsequently to the making of the contract.

The method in which a demand is to be enforced, is to be determined not by the law of the state, where the demand originally accrued, but by the law of this state.

The case of *Rowland v. Stephenson*, 1 *Halst.* 149, overruled.

VROOM, for defendant.

Wood, for plaintiff.

EWING, C. J. The defendant having been arrested on a *capias ad respondendum*, in an action on the case for goods, wares and merchandise, sold and delivered, as appears by the affidavit for bail, has applied to be permitted to file common bail, upon the ground that since the making of the contract, he has been discharged from imprisonment, under an act previously passed for

the relief of insolvent debtors, in the state of New-York, where the debt was contracted, and where both parties resided at the time of the contract and of the discharge.

Nov. 1828.

Wood
v.
Malia.

The effect of the discharge of an insolvent debtor, and the protection which such discharge is to afford to him in a different state from that in which the discharge was obtained, have been the subjects of much discussion and diversity of opinion in the state judicatories, and perhaps more than any other questions have divided and embarrassed the Supreme Court of the United States. These difficulties have, however, chiefly arisen, when the debtor has been by the terms of the legislative acts discharged from his debts. When the discharge has been simply from actual confinement and future imprisonment for debts previously contracted, much less of doubt or controversy has occurred; and whatever may have once existed, must, it is presumed, be dissipated by the reasoning and decision in *Sturges v. Crowninshield*, 4 Wheat. 197. By that case the distinction between the contract and the imprisonment, between the obligation of the contract, and the means to enforce it was clearly settled. "A contract" says *Chief Justice Marshall*, "is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." "The distinction between the obligation of the contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor, may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation."

The distinction between the imprisonment and the contract, between the contract, and the means to enforce it, or in other words, the remedy upon it, being ascertained; the doctrine that the debtor may be released from confinement without impairing the obligation of the contract, but leaving it in full force being established; the application of the principles of the common

Nov. 1828.

Wood
v.
Malin.

law which yield to the *lex fori*, the law of the country where the action is instituted, the regulation of the remedy and to determine when an arrest may take place, when imprisonment may be used to enforce the performance of a subsisting contract, is readily made. In *Robinson v. Bland*, 2 Burr. 1084, Justice Wilmot said, "if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed." In *Holman v. Johnson*, Cowp. 343, Lord Mansfield said, "every action tried here must be tried by the law of England." In *Maulé v. Murray*, 7 T. R. 407, a person who had been arrested in New-York, having been afterwards arrested, for the same cause of action in England, the Court of King's Bench were of opinion they ought not to take judicial notice of an arrest in a foreign country, and that it would be unjust to deprive the plaintiffs of perhaps the only security they had for the payments of their debt; and refused to discharge the defendant on common bail. In *Duplein v. De Roven*, 2 Vern. 540, the statute of limitations of England, was held to be pleadable there to an action founded on a contract made in France between parties resident there. In *Melan v. Fitzjames*, 1 B. & P. 138, an application was made to discharge on common bail, a defendant who had been arrested upon a contract made in France, which by the law of that nation was considered as not affecting the person. Two of the judges held that the defendant must be discharged on common bail. The other Judge, Heath, said that "in construing contracts, we must be governed by the law of the country in which they were made, but when we come to remedies it is another thing; they must be pursued by the means which the law points out where the party resides." The opinion of Heath has been since recognized to be the sound legal doctrine, in the case of *Imlay v. Ellefsen*, 2 East 453. In the case of *Ogden v. Saunders*, 12 Wheat. 285, the following remarks were made by Justice Johnson—"Whenever an individual enters into a contract, I think his assent is to be inferred to abide by those rules in the administration of justice, which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract, remains the same in every tribunal, but the remedy necessarily varies."

Nov. 1898.

Wood
v.
Malin.

According to these principles then, when a creditor comes here with a fair, valid, subsisting demand, and especially one on which no judicial act has yet passed, the method whereby that demand is to be enforced here, and consequently whether by imprisonment of the debtor or otherwise, is to be determined not by the law of the state where the demand originally occurred, but by our institutions. One state may properly say, we will not subject the person of the debtor to restraint on this contract, but it does not therefore follow, the contract remaining wholly unimpaired, that another state may not enforce it by means of imprisonment. A few instances may serve for illustration. If imprisonment for debt were abolished in this state, a creditor from another state, would ask in vain to arrest his debtor here, because it might be done where the debt was contracted. In one of the states, real property cannot be sold on execution for the payment of debts; in another, it must be taken by the creditor at an appraisal; and in another, it is extended and the creditor is to be satisfied out of the rents and profits; but the remedy afforded here to the creditor, would be by absolute sale of the debtor's real property, although the contract was made in either of those states. In Massachusetts, a creditor may cause the goods of his debtor, though not absent or absconding, to be attached at the commencement of a suit, yet he could have no such remedy in New-Jersey, although the contract had been made in the former state.

A brief view of the leading decisions in several of the states, on the question under consideration, could not be unprofitable. In *Smith v. Spinola*, 2 John. 198, both parties resided in Madeira, and the debt was contracted there. By the law of Portugal extending to that island, the body of the debtor could not be arrested either before or after judgment, and the defendant in this suit moved to have an exoneretur entered on the bail piece. It was refused. The court said, "the remedy must be pursued according to the laws of the country in which the action was brought. If a foreign creditor pursued his debtor here, he is entitled to the more efficacious remedy provided by our laws for the recovery of debts." In *White v. Canfield*, 7 John. 117, to debt on a judgment in the Supreme Court of Connecticut, the defendant pleaded a discharge under the insolvent act of that state, by which, on making an assignment, he obtained a certificate which

Nov. 1828.

Wood
v.
Malin.

should operate to protect his person. The defendant resided in Connecticut; the plaintiff in New-York, where the cause of action arose. The court said, "the certificate granted to the defendant in Connecticut, was not a discharge from the debt but only from imprisonment. It was therefore limited in its object and local in its effect, and the discharge was no bar to an action on the judgment." In *Sicard v. Whale*, 11 John. 194, the debt was contracted in Pennsylvania. Both parties resided there. The defendant obtained there a discharge under the insolvent law of that state from imprisonment, and from all liability of his person for any debt, before that time contracted. The plaintiff at the time of the discharge, and of the commencement of the suit in New-York, was a resident of Pennsylvania. The court refused to order an exoneration; and *Thompson, C. J.* said: "It is impossible to distinguish this case from that of *Smith v. Spinola*. That case was decided on a sound principle, that if a foreign creditor pursues his debtor here, he is entitled to the remedy provided by our laws. We look only to the course of proceeding established in our own courts." In *Peck v. Hozier*, 14 John. 346, judgment having been obtained in Boston, on a debt contracted at Barbadoes, execution was issued, the defendant was imprisoned and was discharged as an insolvent debtor. Being afterwards arrested in New-York, he was discharged on common bail by the recorder, on the ground of having been formerly arrested and imprisoned for the same cause. But the Supreme Court vacated the recorder's order saying, that "the discharge in Massachusetts was local only, and of the person, not of the debt; that the plaintiff was entitled to the remedy which the laws of New-York afforded, and that they did not in that respect, take notice of an arrest abroad or in another state." In *Whittemore v. Adams*, 2 Cowen 626, to an action on promissory notes made at Alexandria, in the district of Columbia, the defendant pleaded a discharge under the act of Congress for the relief of insolvent debtors, within the district of Columbia. A general judgment was rendered for the plaintiff. The court said, "giving to this discharge, all the effect which can possibly be claimed under the act of Congress, it does not operate on the contract, but merely on the mode of enforcing it. It is a personal discharge of the defendant, nothing more, and must from its very nature be confined to the district of Columbia." "A long un-

Nov. 1828.

Wood
v.
Malin.

broken series of decisions have denied any effect to these personal discharges, beyond the bounds of the state where they are granted." In *Hinkley v. Marean*, 3 *Mason* 88, to an action on a bill of exchange accepted by the defendant at Baltimore, he pleaded the statute of insolvency of Maryland, whereby the defendant then being an inhabitant of that state was discharged on the 3d September 1819. *Justice Story* said: "so far as they [the acts of Maryland] authorise a discharge of the person, estate or effects of the insolvent before the 3d of September 1819, they are merely local, and can have no authority here. They are addressed to the *lex fori*. The present suit is to be decided by the law of Massachusetts; and a discharge of the person of the debtor in another state, which leaves the contract in full force has no effect to discharge the person here. No court gives effect to the local laws of another state in respect to the forms or force of process. When the right exists, the remedy is to be pursued according to the *lex fori* where the suit is brought." In *Pearsall v. Dwight*, 2 *Mass.* 84, *Parsons, C. J.* said, "the party claiming the benefit of the note in this case, [which had been made in New-York where the plaintiff resided] has sued it originally in a court of this state. The law of the State of New-York will therefore be adopted by the court in deciding on the nature, validity and construction of this contract. Thus we are obliged to do by our own laws. So far, the obligation of comity extends, but it extends no farther. The form of the action, the course of judicial proceedings and the time when the action may be commenced, must be directed exclusively by the laws of this commonwealth. These are matters not relating to the validity of the contract." In *Blanchard v. Russel*, 13 *Mass.* 4, *Parker, C. J.* said: "the rule [that contracts are to be construed and interpreted according to the laws of the state in which they are made] does not apply to the process by which a creditor shall attempt to enforce his demand in the courts of a state, other than that in which the contract was made. For the remedy must be pursuant to the laws of the state, where it is sought otherwise, great irregularity and confusion would be introduced into the forms of judicial proceedings." In *Woodbridge v. Wright*, 3 *Conn. Rep.* 523, the question was, whether upon a judgment for the plaintiff for goods sold and delivered in New-York by his agents to the defendant, who was afterwards discharged from

Nov 1828.

Wood
v.
Malin.

imprisonment under the insolvent law of that state, the execution should issue against the body of the defendant, or against his goods and estate only. The court held, that the execution should go against body and estate; and *Peters, J.* in delivering their opinion said, "It is a well settled principle, universally admitted, that contracts are to be construed according to the *lex loci contractus*, but enforced according to the *lex fori*, that is, the validity and legal effect of contracts are to be tested by the law of the country where they are made, but the remedy for a violation of those contracts, is to be regulated by the law of the country where it is sought. In *Atwater v. Townsend*, 4 Conn. Rep. 47, the defendant was sued as the acceptor of a bill of exchange in New-York, where he resided, and was afterwards discharged under the insolvent law. The plaintiff resided in New-Haven. On the trial, the judge decided that the plaintiff was entitled to recover. The question was reserved for the advice of all the judges in the Supreme Court of Errors, where the counsel of the defendant insisted, that the same effect should be given to the insolvent laws of New-York, when used by way of defence as would be given to them in that state. But the Supreme Court of Error was of a different opinion, and advised that judgment should be given for the plaintiff, and *Hosmer, C. J.* said: "The question had been often decided and must be considered as at rest." In *Smith v. Healey*, 4 Conn. Rep. 49, the defendant had been discharged pursuant to the act giving relief in certain cases of insolvency of the state of New-York, passed on the 12th of April 1813. At the time of contracting the debt which was subsequent to the act and until the discharge was obtained, the parties were inhabitants of the state of New-York. The defendant claimed that the discharge was effectual in the state of Connecticut, to protect his body from imprisonment on account of the plaintiff's demand. This claim, the plaintiff resisted and after judgment in his favor, prayed for execution against the defendant's body as well as against his estate. The court reserved the question for the advice of all the judges, who decided, that execution should issue against both body and estate of the defendant.

It will be seen that in the foregoing cases no distinction prevailed on account of the place where the contract was made, or where the parties resided at the time of the contract or discharge.

In Pennsylvania, in the case of *James v. Allen*, 1 Dall. 188, the earliest reported decision in this country, on the subject appears to have been made. A discharge from imprisonment under the insolvent law of New-Jersey, was held insufficient to protect the debtor from imprisonment in Pennsylvania, even when the debt on which he had been imprisoned in New-Jersey, was the same for which he was sued in Pennsylvania. The court said : "The local laws of another country with regard to the release of the debtor from confinement, cannot have the effect of restraining us from proceeding according to our own laws here. Insolvent laws have never been considered as binding out of the limits of the states that made them." The case of *Millar v. Hall*, 1 Dall. 229, was afterwards decided. The plaintiff resided in Philadelphia, the defendant in Maryland, where the money for which the action was brought was paid to him. The original agreement under which they acted was made in Philadelphia, where the money was to be paid. The defendant obtained a discharge under the insolvent law of Maryland, and being arrested in Pennsylvania and held to bail, an exoneretur was, on his application, ordered to be entered on the bail piece. Whether in this case the discharge was of the debt, or only of the person from imprisonment, stands in doubt. The counsel in arguing said the act worked no extinguishment of the debt, but left all future acquisitions of property liable to creditors. But in *Walsh v. Nourse*, 5 Binney 383, Binney arguendo said, "In *Millar v. Hall*, and the other cases ruled by it, the discharge was under a bankrupt law which wiped off the debt." Other cases were subsequently decided expressly on the strength of that case. *Thompson v. Young*, 1 Dall. 294. *Donaldson v. Chambers*, 2 Dall. 100. *Hilliard v. Greenleaf*, 5 Binney 336, note. The rule now established in Pennsylvania is, to extend the same courtesy to other states, as such other states shew to them ; to pay the same regard, and give the same effect to a discharge under the insolvent laws of any other state, as the courts of such state would do to discharges under the insolvent laws of Pennsylvania. *Smith v. Brown*, 3 Binney 201. And this rule seems to prevail, rather from a cautious adherence to precedents than from an entire conviction of its soundness. In *Walsh v. Nourse*, 5 Binney, 385, Ch. Just. Tilghman said, that not without considerable reluctance, he had thought himself bound by former decisions, that is,

Nov. 1828.

Wood
v.
Malin.

Nov. 1828.

Wood
v.
Malin.

bound to pursue the principle of reciprocity ; and that if the matter were to be taken up anew, he should be for adhering to what he considered the true principle.

In coming to the conclusion, which I conceive to be proper on this occasion, the greatest difficulty, indeed the only serious one I have met with, is the case of *Stevenson v. Rowland*, decided in this court, 1 *Halst.* 149, which must be admitted to be strongly in point, in support of the defendants' motion. Unhappily the reasons of the court, from which we might learn the ground of the decision, are not given. In departing from it however, I feel less hesitation, because the case of *Sturges v. Crowninshield* was not submitted to their consideration, and because one of the members, who then composed the court, on another occasion, laid down the following doctrine : " Every state may prescribe the mode of administering justice within itself. It may say that the debtor shall not be imprisoned, or if imprisoned that he shall be discharged from his imprisonment. The commonwealth of Pennsylvania might therefore fairly discharge this defendant from the imprisonment of his person, for the imprisonment itself is but the mere mode of enforcing the contract, and no part of the contract itself. But then this discharge of the person can have no force, but within the limits of the commonwealth, for the contract still remaining unimpaired and in its full force, either the state of Maryland, or any other sovereignty, will carry it into effect according to its own mode of administering justice, the discharge in Pennsylvania notwithstanding." *Van-uxem v. Hazlehurst*, 1 *South.* 202.

In deciding this matter in a summary way, on rule to shew cause, it is satisfactory to reflect that the defendant need not, as in ordinary cases, be deprived of an opportunity to review, if he thinks proper, our opinion, since he may plead his discharge and thus place the question on the record.

Justices, FORD and DRAKE, concurred.

Let the rule to shew cause be discharged.

Nov. 1828.

DEN *ex dem.* MORRIS ABER AND MORRIS ABER, JUN. *against* JOHN CLARK.

Den
v.
Clark..

10 217
46c 364

IN EJECTMENT.

1. An inquisition of lunacy, is not conclusive against any person not a party to it.

2. When an inquisition is admitted in evidence, the party against whom it is used, may introduce proof that the alleged lunatic was of sound mind, at any period of time covered by the inquisition.

3. The party against whom the inquisition is received, may impugn the finding, by contrary evidence, without first pursuing the procedure technically called a traverse of the inquisition.

J. W. MILLER, for defendant.

Ira C. Whitehead, for plaintiff.

The Chief Justice delivered the opinion of the court.

In deducing title on the trial of this cause, the plaintiff gave in evidence a mortgage of the premises in question, made by one Hercules Aber, on the 15th day of February 1812.

The defendant to impeach the mortgage, gave in evidence a commission of lunacy, and an inquisition thereon, taken on the 30th March 1824, whereby it was found that the said Hercules Aber was on that day a lunatic, of unsound mind, and not enjoying lucid intervals, and had been in the same state of lunacy for the space of sixteen years then last past and upwards. Notice, of the taking of the inquisition, was not given to the holders of the mortgage, nor did they take any part therein.

The justice who held the circuit decided that the inquisition was not conclusive evidence of the lunacy, and permitted the plaintiff to introduce witnesses, and they were introduced by both parties, relative to the alleged lunacy of Hercules Aber, at the execution of the mortgage. The jury rendered a verdict for the plaintiff. The only questions submitted to us by the state of the case, prepared by the parties, are, "whether the inquisition was conclusive, as to the lunacy? and whether the court did right in admitting the testimony of the plaintiffs on that point?" In *Sergeson v. Sealey*, 2 *Atk.* 412, an objection was made before Lord Hardwicke, to the reading of an inquisition of lunacy because offered as evidence to affect the right of a third person, and as it likewise had a retrospect of eight years. He overruled

Nov. 1828.

Den
v.
Clark.

the objection and said that "inquisitions of lunacy are always admitted to be read, but are not conclusive evidence, for you may traverse them if you please." Witnesses were examined to encounter the inquisition, and in delivering his opinion on the case he said, "there is not at present, before me, sufficient evidence to satisfy me that he was absolutely a lunatic or *non compos*. When I admitted the inquisition to be read, I said it was not conclusive evidence; for it is not conclusive as to the point of time of taking the inquisition, much less as to the retrospect of eight years, for notwithstanding such inquisition, there are numerous instances of a subsequent inquiry." In *ex parte Barnsley*, 3 Atk. 484, an application having been made to Lord Hardwicke, to traverse a second inquisition, the first having been set aside for informality, he dismissed the petition, and among other things said, "in all these inquisitions they are not at all conclusive, for they may bring actions at law, or a bill to set aside conveyances." In *Hall v. Warren*, 9 Vez. 603, a bill was filed to obtain the specific performance of an agreement executed by the defendant, and dated the 9th March, 1802. On the 8th of May following, under a commission of lunacy, the defendant was found a lunatic from the 1st of May 1792, with lucid intervals. One ground of defence was that he was insane at the time of the contract, and a great deal of evidence was gone into on both sides as to the state of his mind. The master of the rolls said, "that inquisition, having been taken in the absence of the plaintiff, is not conclusive upon him. But it is evidence *prima facie* of the lunacy. It is however competent to third parties to dispute the fact and to maintain that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers. An opportunity it is said has already been afforded of traversing the inquisition; and undoubtedly if it would have answered the plaintiff's purpose, merely to have traversed and contradicted the finding, by shewing that the defendant was not a lunatic, he ought to have embraced that opportunity, and it was unnecessary to come here in the first instance. But if, as is said, he may have been a lunatic, with reference to the general state and habit of his mind, during a considerable space of time, but with lucid intervals, I doubt very much whether that could have been got at by a traverse. It was not therefore improper for the plaintiff, under these circumstan-

Nov. 1823.

Don
v.
Clark.

cés, to waive the opportunity of traversing, and to come here for an issue." He farther observed that it was an inquiry much more fit for examination *viva voce* before a jury, than upon written depositions, and ordered an issue. In *Faulder v. Silk*, 3 Camp. 126, in debt on bond, upon a plea of *non est factum*, to shew the obligor to have been in a state of insanity when he executed the bond, an inquisition of lunacy, finding him a lunatic from a day prior to the date of the bond, without any lucid intervals was offered in evidence. An objection being made as *res inter alia acta*, Lord Ellenborough said, "although the inquisition was by no means conclusive on the trial of the issue it was admissible, and that it would be for the jury after comparing it with the other facts in the cause, to determine what weight it was entitled to."

Maddox in his treatise on chancery practice, states the following doctrine: "An inquisition is only presumptive evidence of insanity and not conclusive, so that upon an action in respect to any contract or deed, it is for a jury to determine whether at the time of executing it, the party was *non compos*, though by the inquisition he was found to be *non compos* at such period." 2 *Madd.* 578.

From these citations the following conclusions are deducible.

1. An inquisition of lunacy is not conclusive against any person not a party to it.

2. When an inquisition is admitted in evidence, the party against whom it is used may introduce proof that the alleged lunatic was of sound mind at any period of the time covered by the inquisition. This position is indeed a corollary from the former, as it would be inconsistent to say the inquisition was not conclusive, and at the same time to refuse to receive any evidence to contradict the fact stated in it.

3. The party, against whom the inquisition is received, may impugn the finding by contrary evidence, without first pursuing the procedure technically called a traverse of the inquisition. If such be the rule, in the English Courts, we may with more propriety recognize it here, as we have not enacted among our laws the provision contained in the statute, 2 Ed. 6, Ch. 8, Sec. 6, on which according to some writers the proceeding by traverse in England depends at least as a matter of right.

The counsel of the defendant in his brief, referred us to 1

Nov 1828.

Dan.
v.
Clark.

Phil. on Evid. 299, for the purpose of shewing that an inquisition of *felo de se* which carries with it a forfeiture of estate, is conclusive until traversed in the court of *King's Bench*. But against whom? The author says, *Lord Coke* considered it conclusive evidence of the fact against the executors or administrators of the deceased; that *Lord Hale* was of a contrary opinion; and that it is now settled that such an inquisition may be removed into the *King's Bench*, and traversed by the executors or administrators of the deceased. Nothing is said however as to the effect of the inquisition against third persons. In *Page* 301, *Philips* speaks of the inquisition of lunacy. He says it is evidence against third persons who were strangers to the proceeding. He does not directly say whether conclusive or *prima facie*, though his meaning cannot readily be misunderstood; but to support his position he cites the case, already mentioned, of *Sergeson v. Seale*, in which *Lord Hardwicke* says it may be read, but is not conclusive. In *ex parte Roberts* 3 *Atk.* 5, in matter of lunacy, another case referred to in the defendant's brief, the *Chancellor* said: "the question therefore is, whether I shall grant leave for the lunatic to traverse or not. Upon reasonable terms I am willing to put it in some method of inquiry, and it will be for the advantage of all parties; for if I grant the custody, the committees must bring a bill to set aside the settlement which he has made of his estate, and Dr. Finney would have a just right to insist on the validity of it, so that an issue must be directed to try it, and such an issue would be a greater expense to the parties than a traverse, and therefore I asked whether Dr. Finney would submit to be bound by the traverse; for though it would be binding against Mr. Roberts, it would not be so against Dr. Finney, as to the grant of the custody of the land, who claims as a purchaser."

From these remarks, it is clear the *Chancellor* held a different opinion from the proposition insisted on in the defendant's brief, that the inquisition is conclusive until traversed in chancery and set aside; for he says Finney who claimed as the purchaser of the alleged lunatic's estate would have a just right to insist on the validity of the conveyance to him, notwithstanding the inquisition, and that even if upon a traverse the inquisition had been confirmed he would not have been bound unless he had submitted to be bound by the traverse.

Nov. 1828.

Den
v.
Clark.

The disastrous consequences of the retroactive operation of an inquisition, if conclusive, strongly recommend the wisdom and policy of withholding from it such influence. In its nature it is *ex parte*. It would be inconsistent with the common and uniform principles of jurisprudence, to suffer an act of such a nature to sweep away with irresistible force all contracts executed under whatever circumstances of solemnity, and even to abrogate the contract of marriage, at the expense of the undelivered and truly unfortunate offspring. Such is the diversity of judgment respecting the state of the mind, that on this, more than perhaps any other question, error may be anticipated from uncontroverted proofs and *ex parte* examinations. *Joliffe* would have been found of insane mind, if the witnesses to his will, and his dozen servants had alone testified. *Lowe v. Joliffe*, 1 *Wm. Bl.* 365. The will of John Sinnickson, instead of being sanctioned by the verdict of a jury, would have been condemned, had the question of his capacity depended on the witnesses of one of the parties. *Harrison v. Rowan*, 3 *Wash.* 580. The mental capacity of Benjamin Vancleve was proved to the satisfaction of two juries, one in this court, and one in the Circuit Court of the United States, yet was denied by a number of respectable witnesses. 2 *South.* 589.

The first question proposed to us should, in my opinion, be answered in the negative, the second in the affirmative, and judgment should be entered for the plaintiff on the verdict.

FORD, J. concurred.

DRAKE, J. gave no opinion, having been of counsel for one of the parties.

Judgment for the plaintiff.

Nov. 1828.

Herbert

v.

Hardenbergh.

OBADIAH HERBERT *against* JACOB R. HARDENBERGH.

Though a writ of error has been brought, and one of the errors assigned for the reversal of the judgment, is the excess of the judgment over the sum demanded in the declaration, this court will allow the party in whose favor the judgment is, to amend the record, by entering a remittitur of the surplus, and a judgment for the amount mentioned in the declaration.

Wood, for the plaintiff.

C. L. Hardenbergh, for the defendant.

The Chief Justice delivered the opinion of the Court.

In this action, which was in *assumpsit* for goods sold and delivered, &c. and which had been depending for several years, a verdict, at the Middlesex December Circuit 1826, was rendered for the plaintiff for a sum exceeding the amount of damages laid in the declaration. Judgment having been accordingly entered, a writ of error was brought, and in the Court of Appeals, errors were assigned upon the matters contained in a bill of exceptions taken on the trial, and on the excess of the judgment beyond the amount demanded. Afterwards, in May term last, the plaintiff moved this court for leave to amend, by the entry of a remittitur of the surplus, and to have judgment for the amount mentioned in the declaration. The counsel of the parties were heard upon the motion. At the instance of the defendant's counsel, who desired to be farther heard, the court have until now suspended their opinion.

The doctrine of amendments has not at all times maintained an entire uniformity. Greater and less degrees of strictness have prevailed at different periods. In modern times, a laudable liberality has inclined the courts to the allowance of amendments intended to advance the interests of justice, and to prevent the rights of parties from being defeated or lost by errors which do not affect the merits of the cause. Cases are to be found in the books, the leading ones will be noticed hereafter, in which applications, not unlike the present, have been refused; but there are others which, in fact as well as in principle, not only warrant, but require us, to allow the amendment now sought.

In the late case of *Usher v. Dansey*, 4 M. and S. 94, the subject was examined at large in the Court of Kings Bench. It was

10	222
59	444

an action of assumpsit on a bill of exchange, the damages were laid at £1630. A verdict was found and judgment rendered for £1685. A writ of error was brought to the House of Lords. An assignment of errors and joinder were filed. Then the plaintiffs moved the Court of King's Bench, for liberty to amend the judgment roll, by entering a remittitur of £55, and to have judgment for the residue, and also to amend the transcript on payment of costs in error. The amendment was ordered by the court. *Lord Ellenborough*, in delivering his opinion, went into a review of the cases. He said there are two express authorities for allowing this amendment. *Hardy v. Cathcart, Marsh. Rep.* 180, and *Pickwood v. Wright*, 1 *H. B.* 643. *Hardy v. Cathcart* was a penal action, and the jury found for the plaintiff with one shilling damages, which could not lawfully be, because damages cannot be given for the detention of the debt in a penal action. Judgment having been entered for damages, error was brought for that cause, and on application to the court of C. P. for leave to amend the judgment by entering a remittitur of the damages, the court, after a review of the precedents, thought itself at liberty to make the amendment. The other case I shall state hereafter from the reporter. *Lord Ellenborough* farther remarks : "Certainly this has been considered in former cases as the misprision of the clerk. In *Owen* 45, the plaintiff laid his damages at £20, the jury gave £30, and by the court the plaintiff shall recover no more than he has declared for, and this ought to be done of course by the clerks," and for this position, 2 *Hen.* 6, 7, 8 *Hen.* 6, 4, and 42, *Ed.* 3, 7, are cited. He concludes by saying ; "Without determining whether this may be treated as *vitium clerici*, which however seems to have been the opinion in *Hardy v. Cathcart*, or whether it falls within the scope of the court's general authority to amend, as in *Pickwood v. Wright*, it appears from that case that the court has authority to amend such errors as this after the term of the judgment." The case of *Pickwood v. Wright* is in substance as follows : In assumpsit the damages laid in the declaration were £600 ; the verdict was for £611, and the judgment accordingly. After a writ of error was brought, a rule to shew cause why a remittitur should not be entered was taken in the court of C. B. It was opposed as too late after judgment signed, and writ of error brought. But the court thought it was reasonable to allow the amendment, and

Nov. 1828.

Herbert

v.
Hardy v. Cathcart

Nov. 1828.

Herbert
v.
Hardenburgh.

therefore made the rule absolute on payment of the costs of the writ of error. This amendment was made in a term subsequent to the judgment, the former being of Trinity, the latter of Easter term preceding. In *Rees v. Morgan*, 3 T. R. 530, upon error to the great sessions at Glamorgan, the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, without finding either the amount of the rent in arrear, or the value of the cattle distrained; and the judgment was entered for the damages assessed. After writ of error brought and errors assigned, the Court of King's Bench permitted the defendant in error to amend his judgment, and to enter a judgment *pro retorno habendo*. In *Petrie* and another, *Executors v. Hannay*, 3 T. R. 659, an action for money paid by the plaintiffs as executors, and also for money paid by the testator to the use of the defendant, for money had and received by the defendant to the use of the plaintiffs as executors, and for money had and received to the use of the testator, in separate counts, to which there were two pleas, the general issue and the statute of limitations, a verdict was found for the plaintiffs, generally on the first issue, and no notice taken of the last. The defendant brought a writ of error in the *House of Lords* on two grounds; that no verdict was given on the second plea, and that the two separate demands could not be joined in one action. There was a joinder in error, and a day appointed for the argument in the *House of Lords*. The plaintiffs then moved the Court of King's Bench for liberty to amend according to the judges notes, by adding a verdict for them on the second plea, and by entering the verdict on the counts for money paid by the executors and had and received to their use. It was opposed as too late, for the plaintiffs themselves had joined in error. But the court ordered the amendment to be made, and justice Buller said, such amendments had been frequently permitted. In *Short v. Coffin*, 5 Burr. 2730, the Court of King's Bench ordered a judgment against an executor *de bonis propriis* to be amended by making it *de bonis testatoris si et si non etc.* after a writ of error had been brought, and an argument had in the Exchequer Chamber. In *Friend v. Duke of Richmond*, Hadr. 506, after error brought an amendment was moved. But as it appeared the record had not been certified, the plaintiff was at liberty to fill up the blank

left for the costs. *Ch. Baron Hale* said :—" If such an imperfect record had been certified, yet it might be amended by rule of court here ; and then if it be removed by error, the court there must amend it. For it is the constant practice, that if a record be removed into the K. B. out of the C. B. by writ of error, and afterwards amended by rule of court in the C. B. the Court of K. B. must amend it accordingly." In *Richardson v. Mellish*, 3 *Bingham* 334. C. B. a general verdict was given on a declaration, some of the counts of which were bad. After argument in error in the K. B. the C. B. amended the postea and entered the judgment on a single count. *Best, Chief Justice*, said, " There are authorities for our amending the postea after argument in a Court of Error. It is never too late to do on proper terms, what is necessary to be done to prevent injustice. Such amendments [verdicts amended by the judge's notes] have been made after judgment in many cases." *Park, Justice*, said, " If the court did not make this amendment they would be defeating the due administration of justice instead of advancing it." *Gaselee, Justice* said : " It did not appear to him to be material, whether the error be the misprision of the clerk, or of the attorney who takes the verdict."

Nov. 1828.

Hogbert
v.
Hardenbergh.

The leading cases in the English books, in opposition to the amendment, are *Wray v. Lister*, 2 *Str.* 1110, and *Chevely v. Morris*, 2 *W. B.* 1300. In the former, after error brought, the plaintiff moved to remit the surplus, and enter judgment for the damages demanded only. One justice was in favor of doing it, but the others held it could not be done in another term. In *Chevely v. Morris*, after error assigned that the damages found by the jury, and for which judgment was rendered, exceeded the declaration, the *Kings Bench* was moved to amend the record ; but it being out of time, " and the plaintiff having acted oppressively in suing out execution and taking the defendant's books, who was a gentleman at the bar, in a very insolent and invidious manner," the court refused the motion. The weight of the first of these cases is lessened by the division of the court, and of the other, at least as a general rule, because one ground on which the amendment was refused, was the oppressive use the plaintiff had made of the execution.

In 10 *Mass. Rep.* 252, the following case is mentioned. On a trial in that court a few years previously a verdict was render-

Nov. 1822.

Herbert
v
Hardenbergh.

ed for a plaintiff, for a sum greater than the damages demanded in his writ. The error was not perceived, and no remittitur of the excess was entered at the time. Afterwards, and after a writ of error brought for this cause, the court permitted an amendment of the record by the original plaintiff's entering a remittitur. In *Davenport v. Bradley*, 4 Conn. Rep. 309, judgment had been rendered beyond the amount demanded; no application to amend was made, but the plaintiff entered a remittitur of his own act after judgment. The Supreme Court of Errors said the judgment below was undoubtedly erroneous; that a remittitur of the surplus could not be made after judgment, nor in a term subsequent to that in which the judgment was entered; that the judgment below must be reversed, and according to the established practice of the court in similar cases, the cause remanded that the damages might be legally assessed. The reversal would not open the cause below beyond the exigency of justice. The effect of the reversal must be limited to the assessment of damages, and not be suffered by retrospection to vacate any part of the anterior proceedings, in respect of which there had been and could be no complaint. In *Coster v. Phenix*, 7 Cowen 524, on error to the C. P. of New-York, one error assigned was, that the plaintiff below took judgment on a declaration containing a count on a promissory note, with money counts, without entering a *nolle prosequi* as to the latter. After assignment of errors, it was moved to amend, by now entering a *nolle prosequi* as to the money counts, and it was allowed on payment of the costs of the motion and of the writ of error.

In this court the cases of *Probasco v Probasco* and of *Dewey and wife v. Ten Eyck* have occurred. In the former after twenty years, the name of the plaintiff, George, was amended in the judgment to, Garret, which was used in the declaration and plea. *Dewey and wife v. Ten Eyck*, was an action of dower. The verdict was for the demandants on the issue, and found the annual value and damages. On the return of the *postea*, the usual rule for judgment on the *postea* was taken and entered on the minutes. In the record of the judgment, the judgment of *seisin* was omitted and judgment was entered for the annual value and damages. After writ of error brought, and joinder in error and notice of argument, this court amended the record by ordering a judgment of *seisin* to be added.

Nov. 1828.

Herbert
v.
Hardenbergh.

From a careful review of precedents and principles, I am well satisfied the amendment applied for ought to be allowed, and the result will, I think, be approved by every impartial and reflecting mind. No one will insist that the slightest error in principle exists. Admitting that in other respects the judgment is sound, and if it be not, it will meet with its due fate in the Court of Appeals, why should it be lost? why should all the expense and labor and delay be thrown away? why should the parties be subject to the inconvenience of another trial, merely that a verdict should be rendered for the amount in the declaration? or rather indeed, for the same amount at which it now stands, for if the record were remitted after reversal, this court would not hesitate to amend the declaration, if requested, by increasing the amount of damages demanded. Nor will the slightest injury be done to the defendant. If he thinks proper to discontinue the writ of error, the plaintiff here will be compelled to pay the costs of the writ, for without this condition the amendment will not be allowed. His ability to claim a reversal on his real grounds of complaint, will not be in the slightest degree impaired. He may indeed be deprived of a certainty of reversal on the foot of this unforeseen slip; but of this deprivation, he is himself too just to feel the smallest regret.

In allowing the amendment on this occasion, we feel a satisfaction in the reflection that the defendant will, as the case stands, have an opportunity, if he thinks proper, to review our opinion in the Court of Appeals.

Let the amendment be made on condition that the plaintiff pay the costs of this motion, and also of the writ of error, if the plaintiff in error thinks proper to discontinue the same.

Nov. 1828.

MARY GRIFFITH *against* JACOB SCIPLES.

Griffith

Sciples.

It is not necessary that the amount of the judgment appealed from, should be set out in the condition of the appeal bond.

THIS was an application for a mandamus to be directed to the Court of Common Pleas of Somerset, to compel them to restore an appeal, and came before the court upon a case stated by the attorneys of the parties.

L. Kirkpatrick. The only question, agreeably to the case agreed on, is whether it be necessary to set out in the preamble to the condition of an appeal bond the amount for which judgment was rendered before the justice.

In *Revised Laws* 640, will be found all that is said in the statutes respecting the form of the appeal bond.

It is not necessary to set out any preamble whatever; a bond without it would fully satisfy the statute.

If the party choose to make a preamble, the only requisite is, that it be true so far as it goes. If erroneous, it may vitiate the bond, but cannot vitiate if what is stated be true.

The form in Pennington's treatise, from which the bond in question was drawn, does not in the preamble to the condition, set out the sum for which judgment was obtained; the bond in question is copied verbatim from Pennington's treatise.

There is nothing to prevent a recovery upon such a bond.

The only injury that can possibly arise is, that there might be two actions of debt between the same individuals before the same justice, upon which judgment might be given at the same time, and in case of one appeal, the party would not know which case was appealed from.

In such event the Common Pleas would always oblige the party, appellant, to declare from which judgment the appeal was taken.

W. Thompson. In this cause, the appeal was dismissed upon the ground, that the appeal bond did not recite the amount for which judgment was rendered, and I think very properly; the bond should be certain. In this case for ought that appears to the contrary, there are two appeals from the judgment of the same

justice, between the same parties, in the same form of action. Under a late decision of this court, two actions of the same nature may be sustained between the same parties. I refer to the case of *Smock and Throckmorton*, from the county of Monmouth; how are we to know, to what judgment this bond will answer; it may apply to either of the actions, but if it recited the amount there could not be a reasonable doubt. The form in Griffith's treatise requires the amount to be set out; appeal bonds ought to be more certain since the act of the legislature, giving the appealing party the privilege of substituting a new appeal bond, if the first should prove defective.

Nov. 1828.

Griffith
v.
Sciples.

EWING, C. J. An appeal taken to the Court of Common Pleas of the county of Somerset, between these parties, was dismissed because the amount of the debt and costs for which the judgment was rendered was not inserted in the appeal bond. The recital is in these words: "Whereas, the above bounden Mary Griffith, hath appealed from the judgment of James Taylor, esq. justice of the peace in and for the county of Somerset, rendered before the said justice, in a suit wherein she the said Mary Griffith was defendant, and the said Jacob Sciples was plaintiff, in a plea of debt, Now therefore," &c.

We are of opinion the recital in the bond is sufficiently full, explicit and certain. There is nothing in the statute regulating appeals, which either directly or by fair implication requires the insertion of the numerical amount of the judgment; nor does practical convenience render it necessary. The possibility, suggested by the counsel of the appellee, that there may be two judgments, between the same parties, before the same justice, in the same style of action, is very remote, and when it actually exists cannot create any serious difficulty. In the form of an appeal bond given by *Judge Pennington*, in his treatise on the courts for the trial of small causes, the amount of the judgment is not set forth. Policy does not require, even if principle would permit, the imposition of stricter restraints on the review by appeal, than such as are clearly contemplated by the provisions of the statute. In the case *ex parte Alvord and others*, 6 Cowen 585, the Supreme Court of New-York, held that an appeal bond should recite the amount of the judgment of the justice. The ground of this deci-

Nov 1828.

Bowen
v.
Mulford.

sion however is a provision, not contained in our statute, which in the opinion of the court rendered such recital necessary.

Let a peremptory mandamus according to the agreement of the parties, be issued.

SMITH BOWEN *against* JOHN S. MULFORD.

CERTIORARI.

If the summons is issued in the name of J. M. plaintiff, and in the state of demand, a middle letter is inserted, in the name of the plaintiff, (viz. J. S. M.) and the defendant does not appear, but judgment is rendered against him in his absence, the judgment will be reversed.

THIS was a *certiorari* to one of the justices of the peace of the county of Salem, to reverse a judgment, rendered by him in the court for the trial of small causes.

L. Q. C. Elmer, for plaintiff.

M^cCullough, for defendant.

The Chief Justice delivered the opinion of the court.

The summons in this case was issued in the name of John Mulford. The state of demand was filed in the name of John S. Mulford. Judgment was rendered against the defendant below, for the amount of the state of demand.

The introduction of a letter or name between the christian and surname is very common, for the purpose of distinction; and in the use and understanding of the people at large, and therefore in presumption of fact, John Mulford and John S. Mulford, are not the same but different persons. Hence the variance was material. To sanction it, might open the door to serious mischief. The defendant has notice by the summons to answer the suit of John Mulford, but he may be subjected to very deleterious surprise, if the account or demand of another person is exhibited and may pass into judgment against him. If subsequent to such a judgment either of the parties thus uncertainly ascertained, should commence another action against the defend-

Nov 1898.

Welsh
P.
Scudder,

ant, he would have to accomplish an unreasonable, if not an insuperable task in sustaining a plea of former recovery; for by which of the persons is the recovery had? he whose name is entered on the justice's docket? or he who is named in the state of demand? And if in the lapse of a few years, the state of demand be lost, it will become still more difficult to shew that a judgment has been rendered for the demand of John S. Mulford, if in truth, he is the actual plaintiff in this case. To all these hazards and burthens, the defendant ought not to be exposed in order to save the plaintiff from the consequences of carelessness or inattention. If the defendant had appeared and gone into trial without objection, we should have been unwilling to listen to any complaint from him on this ground; but judgment was given in his absence, and the plaintiff proceeded at his own peril.

The cases cited by the counsel of the defendant in *certiorari* are not in point. That of *Franklin v. Talmage*, 5 John. 84, turned on a grant, and depended upon principles not applicable here.

Let the judgment be reversed.

WORLEY AND WELSH *against* SCUDDER AND CORYELL.

In a transitory action, if the venue is not laid in the county where the cause of action arose, or where the defendant resides, the court will on motion, and without affidavit of defence change the venue to the county where the defendant resides, if the plaintiff reside out of the state.

10	231
68	142
10	231
65	526

THE plaintiffs in this case resided in Philadelphia, the defendants in Hunterdon county, and the venue was laid in Gloucester county.

Saxton, on behalf of the defendants moved to change the venue from Gloucester to Hunterdon county, and cited *Dauchy et al. v. Taylor*, 4 Hals. 98, and *Rev. Laws* 453, sec. 4.

Harrison for the plaintiffs, objected that the affidavit on which the motion was founded, did not state that the defendants had any defence to the action, and that it was contrary to the English practice to change the venue upon the common affidavit, where the

Nov. 1828.

Welsh
v.
Scudder.

action was brought upon a promissory note, and cited *Rice v. Vinall*, Barnes' notes, 483. *Watson v. Willis*, *ibid* 485. *Maugir v. Hinds* *ibid* 487. The *Duke of Bedford v. Bray* *ibid* 491. Also, the case of *Abrams and Rolfe v. Wood and others*. 1 South. 30.

Saxton replied, that an affidavit of merits was unnecessary. That our statute had abolished the English practice with regard to venues.

CH. JUSTICE. The doctrine of venue stands upon a different footing in this state from the English practice. In transitory actions, our statute regulates the place in which the venue should be laid, leaving the court the power to change it at their discretion to any of the designated places, which are "the county in which the cause of action arose, or the plaintiff or defendant resides at the time of instituting the action, or if the defendant be not an inhabitant of the state, the county in which the process shall have been served upon him." The plaintiff ought to lay his venue in one of these counties. In this case the venue is laid out of the prescribed bounds, and when this is shewn, we must bring it back within those bounds. If the defendants asked a favor, we might impose terms upon them and require an affidavit of merits; but here they are asking only what the statute gives them. Let the venue be changed to the county of Hunterdon.

FORD, J. The statute is imperative, that the venue shall be laid in one of four places, but here it is laid in neither.

DRAKE, concurred.

Venue changed.

CORNELIUS L. VANGUILDER *against* JOHN STULL.

Nov. 1828.

CERTIORARI.

Vanguilder
v.
Stull.

The *time* when services were rendered, for which the plaintiff claims compensation should be alleged in the state of demand, and if no *time* is stated the judgment will be reversed.

THIS was a *certiorari* to the Court of Common Pleas of the county of Salem, to reverse a judgment rendered on an appeal. The state of demand filed with the justice was as follows: "The plaintiff comes into court on the return day of the summons and demands of the defendant the sum of fifty cents for wintering pasturing and washing a sheep, - - - \$0 50
JOHN STULL.

May 25h 1827."

A judgment was rendered by the Court of Common Pleas, in favour of Stull the plaintiff below.

Eakin, in behalf of Vanguilder the defendant below, moved to reverse this judgment, and among other reasons contended that the state of demand was insufficient and uncertain; that "in all states of demand in justices courts, or declarations in other courts, *time* was necessary to be stated with certainty and precision." And that this had been repeatedly decided by this court, to wit:

In *Pen. 267, Longstreet v. Taylor*, the court said, that "in making out the cause of action, *dates* are proper and requisite."

In *Pen. 320, Lane v. Pissant, ib. 321, Brant v. Woodruff*, the same error appears, though not alleged, and only noticed by the court under the general head, that the demand was insufficient.

In *Pen. 370, Leary v. Vandyke*, after reciting the demand the court say—"Now this, besides that it gives neither *time* nor place to these transactions," &c. &c.

In *Pen. 407, Seely v. Foster*, the court reversed the judgment, because the state of demand was altogether insufficient. After stating three of the charges therein, the court say, "and all these three without any date."

In *Pen. 640, Ramsay v. Emans*, demand was for money had &c. "without any *date*," &c. and held insufficient.

And in *South. 92, Sims v. Smith*, the late *Chief Justice* in giving the opinion of the court said: "The importance of *dates* in these states of demand, is exceedingly manifest in this very

Nov. 1828.

Vanguilder
v.
Stall.

case," &c. and the judgment was reversed for the insufficiency of the demand.

McCulloch for the defendant, in *certiorari*, contra.

The question for the consideration of the court is not, whether the state of demand filed in this cause would be deemed sufficient in the Superior Courts; it is at once conceded, that in them it would be held insufficient. But the court is to decide, whether upon the principles which have been recognised in regulating the proceedings in justice's courts, and from the spirit of the enactments of the legislature, this be a sufficient statement of demand, and drawn with such accuracy and technicality as our law requires in a justice's court. The courts for the trial of small causes were established with a view of bringing justice home to every man's door, and enabling individuals of common understanding to draw their pleadings, and conduct their own business, without resorting to counsel, and thereby incur an expense which the subject matter in dispute might not justify. The sum demanded in this case is but fifty cents; already have two adjudications been had before the constitutional tribunals of our state upon this petty dispute; and should this court hold as strict a hand as is now contended for, in these small cases, and require a technical conformity with the rules of pleading, it would destroy the salutary intentions of the legislature in the enactment of the small cause act.

To the sufficiency of this state of demand, it is objected, that the time when these services were rendered is not stated with certainty and precision.

To this error the case of *Montgomery v. Snowhill*, 1 Pen. 361, affords a full and sufficient answer. The charge in that case was: "To services of my son, in attending your store one year, \$ 50." Divers exceptions were taken in this case, and much was said upon it at the bar. Yet the court there held, that if the party be fully apprised of the demand which is to be set up against him, it is enough, and unanimously affirmed the judgment. In this case there was no averment of the time when the services were rendered, nor any allegation that they were performed at the request of the defendant, and both these were regarded as matter of evidence before the justice. The principle of this case is again recognised in Pen. 461, 466, 560, 654, 712.

In *Reeves v. Roff*, Pen. 609, the action was for money paid

and expended for the use of the defendant, without any allegation that it was at his instance and request, and the demand was held sufficient.

Nov. 1828.

Vaughlder
v.
StuH

Defects in mere matter of form in the declaration, will be cured by the defendant's pleading over, and in some instances, even matters of substance. As in an action of trespass for taking goods, not stating them to be the property of the plaintiff, the defect will be aided if the defendant by his plea admit the plaintiff's property. 1 *Chitty* 402. 1 *Sid.* 184. *Com. Dig. Pleader, C.* 25, 87. *Plowd.* 182. 8 *Coke* 239. To the same point are *Vaughan v. Johnson*, 8 *Johns.* 84. *Drake v. Corderoy*, *Sir W. Jones* 307. *Cro. Car.* 288. 6 *Binney* 24. *Tuke and Condies case* cited in *Osborne v. Brooke*, *Alleyn.* 7.

In support of this error, several cases are cited, but they do not go the length contended for by the counsel. In *Longstreet v. Taylor*, *Pen.* 267, the principle to be deduced is, that in filing a copy of an account instead of a state of demand before a justice, dates must be affixed to the several items of the account.

In *Lane v. Pissant*, *Pen.* 320, a copy of an account was filed without any date to the account and without dates to the several items; yet these omissions were not assigned for error nor noticed by the court.

In *Leary v. Randolph*, *Pen.* 370, the court say, the state of demand is wholly unintelligible and therefore reverse the judgment.

In *Foster v. Seeley*, *Pen.* 408, the court again reverse because the demand was unintelligible.

In *Ramsey v. Evans*, *Pen.* 640, the demand was for money had and received to the use of the plaintiff. It has long been decided that the common count for money had and received is insufficient in a justice's court, and this was sufficient cause for reversal.

In *Sims v. Smith*, *South.* 92, there was no allegation as to the time when the special contract upon which the action was founded, was entered into; and it appears that the date was purposely omitted, with a view of avoiding the effect of a former judgment which was expected to be pleaded in abatement.

But if the demand standing by itself should be deemed defective in this particular, I refer to the item of set off, by

Nov. 1828.

Vangutlder

v.
Stall.

which it appears that the defendant was fully aware of the claim intended to be proved against him, and of the time when the services mentioned in the demand were performed for him.

EWING, C. J. The state of demand in this case makes no mention of the time when the services were rendered, for which the plaintiff claims to recover compensation.

In the case of *Sims v. Smith*, 1 South. 92, the state of demand, because it contained no date, was deemed insufficient, and the judgment was reversed. The same principle is recognized in the cases of *Longstreet v. Taylor*, Penn. 267; *Leary v. Vandyke*, Ibid 370; *Seeley v. Foster*, Ibid 407; and *Ramsay v. Evans*, Ibid 640. In *Lippincott v Smith*, 1 South. 95, the time of the trespass for which the action was brought was set forth in the state of demand to have been "about in the month of September, 1814;" a majority of the court thought this charge sufficiently specific in trespass. Justice Southard was of opinion the allegation was too uncertain, even in trespass, and afforded sufficient ground for reversal. In *Timmerman v. Morrison*, 14 John. 369, on certiorari, a declaration in assumpsit in a justice's court was held bad, for not stating any time. *Comyns, tit. pleader, c. 19*, says, the time of a matter charged in the declaration ought to be certainly alleged, and therefore if in assumpsit, the plaintiff omits the day when the promise was made, it is bad.

The cases cited by the counsel of the defendant, in certiorari, avail nothing. In *Montgomery v. Snowhill*, Penn. 361, the want of time, was not urged, nor indeed from what appears on the state of demand, could such an objection have been well made, in point of fact. In the cases reported in Penn. 461, 466, 654, 712, this point was not raised nor decided. In some of them there were dates; in none was any notice taken of the defect; and in general these cases only prove the rule that mere technical formality is not required in a state of demand.

Let the judgment be reversed.

Nov. 1828.

JOHN DEN *ex dem.* THOMAS AUTEN *against* RICHARD FEN, THE
PRESIDENT AND DIRECTORS OF THE BRIDGEWATER COPPER-
MINING COMPANY, TENANTS IN POSSESSION.

Den
v.
Fen.

IN EJECTMENT.

A judgment by default, in ejectment, against the casual ejector for want of an appearance, will not be set aside because the declaration in ejectment was served by the lessor of the plaintiff.

An affidavit of the service of a declaration in ejectment which states that the copy was served "upon A. B. *said to be* one of the directors of the within named company," is insufficient.

The notice subjoined to the declaration must be read, or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service, and that it has been so done should be stated in the affidavit.

If the service of the declaration in ejectment is not in the regular and ordinary manner, a judgment by default, for want of an appearance, should not be entered, until the court on a rule to shew cause has sanctioned the mode of service.

Vroom, for the defendants.

Wood, for plaintiff.

The Chief Justice delivered the opinion of the court.

Judgment by default against the casual ejector, for want of appearance having been rendered, the counsel of the corporation, who are alleged to be tenants in possession, has moved to set it aside, for several reasons :—1. Because the service of one of the declarations was not made by a competent person. 2. Because the service of the other declaration, as shewn by the affidavit, was not made on a proper person, nor in a full and complete manner. 3. Because a corporate body is not liable to an action of ejectment; and 4. Because if liable, the service of the declaration having been made out of the ordinary manner, the rendition of judgment was irregular, until the court on a rule to shew cause had sanctioned the particular mode of service.

1. One copy of the declaration was served by the lessor of the plaintiff himself, which, it is insisted, should have been done by an indifferent person.

The practical books will be found, on examination, to furnish no distinct, express rule on this head; nor am I aware of any direct adjudication, either in the English reports or those of the state of New-York, the latter of which we are accustomed so

Nov. 1828.

Den
v
Fen.

frequently to consult, as well from their intrinsic merit, as because the practice of that state is more similar than that of either of the other states to our own, and to the common source from which both were drawn. In this court, of late years, the declaration has been in most instances served by the sheriff of the county, and such is the preferable mode; in many instances, by an indifferent person; and in some, by the lessor of the plaintiff himself. Prior to the period just mentioned, an examination of our files shews that the service by the lessor himself, was very common. In the practice of James Kinsey, Elisha Boudinot, Richard Stockton and Samuel Leake, and especially of the latter, it is repeatedly found. Such names cannot, it is true, sanction error, but will go very far to prove that error does not exist. It is probable some ancient decision of the court, of which we have no printed report, but the effect of which may be traced in the practice of that day, had sanctioned this mode of service. If so, no decision or statute or rule of court has since abrogated it. While then we deem the mode of service by an officer or an indifferent person the most eligible, and are inclined rather to discountenance any other, we are not at liberty to condemn a service by the lessor himself, which has to sustain it very numerous precedents, justly amounting to a course of practice; and the more especially as the present is a question of practice rather than principle; and as the manner of service must always be distinctly shewn by affidavit to be placed on file; and as great liberality is exercised in opening judgments by default in ejectment and admitting the tenant to defend the possession.

2. The second objection finds its support in the affidavit endorsed on the declaration, by which it appears that a copy was served "upon Peter D. Vroom, said to be one of the directors of the within named company, by delivering a copy of the same to him personally at his office," in the county of Somerset. This affidavit is defective in two particulars. The expression "said to be," is more equivocal than the strictness required by the rules of practice will allow. It may peradventure mean, as alleged by the plaintiff's counsel, "commonly reputed to be," but it may equally well be true, if some one, utterly uninformed of the fact, had said to the person about to make the service that Peter D. Vroom was a director of the company. Moreover, the mere delivery of a copy is not a sufficient service. The notice subjoined

Nov. 1828.

Den.
v.
Fen.

to the declaration must be read or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service; and that it has been so done should be stated in the affidavit. *Adams*, 209, 217, 219; 2 *Arch. Pr.* 44; 2 *Sel. Pr.* 168; 2 *Dunlap's Pr.* 1008, 1014. The service of the declaration therefore, so far as it depends on this affidavit, is insufficient.

3. The third objection is, that an action of ejectment will not lie against a corporation:—and to support it, an appeal is made to the ancient doctrine, that a corporate body is not amenable in the action of trespass. *Kyd*, in his treatise on corporations, says, “the modern method of tying the title of land by ejectment extends to corporations of every kind, whether in the character of plaintiffs or defendants,” 1 *Kyd* 187. It is not necessary, however at this stage of the suit to examine this question. The present defendant in the declaration is *Richard Fen*, the casual ejector. Whether the corporation will become a party, rests in their option and requires their voluntary act. If the company are not in possession of the premises in question, and of that fact we may presume their agents to be well informed, a judgment by default, and an execution upon it, can dispossess them of nothing; and if they think proper to appear, the plaintiff cannot sustain his action, for he will be required to prove on the trial, what in such case he cannot do, that they are in possession. If on the contrary, the company are actually in possession of the premises which the lessor of the plaintiff claims, there seems to be little, if any, reason to excuse them from defending it on the terms common to all other owners of real estate. It is however premature to decide whether an action of ejectment will lie; and the more especially as the appearance, even voluntary, of the company, will deprive them of no ground of defence, of which they ought justly and rightfully to be permitted to avail themselves.

4. The fourth objection is, that the judgment was irregular, without a previous sanction of the mode of service by a rule to shew cause.

From all the books of practice, there appear to be two methods of proceeding, one called regular or ordinary, when the declaration is served on the tenant himself, or on his wife or some person of his family on the premises, by delivering a copy and

Nov. 1828.

Den
v.
Fen.

reading or otherwise explaining the notice ; and the other, called irregular or extraordinary, when the former method is not practicable. When circumstances compel a resort to the latter procedure, the sanction of the court before judgment by default can be rendered is to be obtained, by a rule on the tenant in possession to shew cause why the mode of service shall not be deemed good service ; and this rule to shew cause is itself to be served in such manner as the court shall direct. *Adams* 216 ; 2 *Arch. Pr.* 44 ; 2 *Sell. P.* 172 ; *Impey Pr. K. B.* 414 ; 2 *Dunl. Pr.* 1013 ; 2 *Burr.* 1176, 1181. In the present case, copies of the declaration were delivered, in the city of New-York, to the president and secretary of the company. The service of process, or of the declaration on ejectment, which is in the nature of process, out of the jurisdiction of the court, and without the state, can by no means be deemed a regular, ordinary service, and can only be warranted by the direct interposition of the court, when circumstances may render it necessary. The possession of the company by shifting agents or casual labourers, the residence and continued absence out of the state of the president and secretary, these and other circumstances may render it proper that the court should sanction and hold good a mode of service affording all substantial benefits to the company, but differing from the ordinary and unattainable method. According then to the established practice, a rule to shew cause should have preceded this judgment by default. If it be suggested that this judgment ought to stand because the affidavit must have been previously read and submitted to the court, it will be recollected that agreeably to directions given by the court some years since, the rule on the tenant to appear is most usually made, and was probably so done in the present case, by an entry, as of course, on the minutes, without making a motion or reading the papers in open court. And moreover, this rule like most others, when the adverse party is not heard, is always taken at the peril of the plaintiff.

On this fourth objection, the judgment by default should be set aside.

WORLEY AND WELSH *against* GLENTWORTH.THE SAME *vs.* THE SAME.

Nov. 1828.

Worley
v
Glentworth.

The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promissory notes drawn at different dates and payable at different times, where it does not appear that the defence is the same in each.

These were separate actions, on two several promissory notes brought by the plaintiffs, as endorsees, against the defendant as endorser. The notes were dated on different days, for different sums, and payable at different times to the defendant, who endorsed them to the plaintiffs. The writs were returnable to the same term, though issued and served at different times; and the first writ was issued before the second note became due.

Wm. Halsted, for the defendant, moved to consolidate these actions, and cited 4 *Halst. Rep.* 335. 2 *Arch. Prac.* 180. *Barn. Notes*, 341.

Harrison, contra, cited *Forrester*, 30. 9 *John. Rep.* 262. *Thompson v. Shepherd*.

The Chief Justice delivered the opinion of the court.

We think we ought not to order the consolidation applied for. We find no principle or precedent to support it. The case read by the plaintiffs' counsel from 9 *John. Rep.* 262, though of no binding authority here, yet is entitled to weight. In that case the consolidation was refused under stronger circumstances.

The Legislature direct us to consolidate unnecessary actions. Can we say these actions are unnecessary? The defendant has not shown that the defence is the same in each. Indeed he does not shew that he has any defence at all.

Motion denied

Nov. 1888.

State
v.
Hutchinson.

THE STATE against JAMES HUTCHINSON.

CERTIORARI.

10	242
57	316

If the proceedings in a matter of road are removed into the Supreme Court, and an objection is there taken, that the surveyors did not take the oath prescribed by law; unless it appears in some way either upon the face of the affidavit or otherwise, that the person before whom the oath was taken, was a justice of the peace, the proceedings will be set aside.

In order to prove the oaths of office of the surveyors, it is not necessary to produce the original oaths which are filed with the clerk of the township; it is sufficient to produce copies proved to be true copies.

THIS was a *certiorari* to the Court of Common Pleas of the county of Middlesex, to remove the proceedings in a matter of road, which had been ordered by that court to be recorded. On the return of the *certiorari* a rule to take affidavits was applied for on behalf of the prosecutor of the *certiorari*, and obtained. Under this rule several witnesses were examined, two of whom proved that certain papers shown to them (and returned with the depositions) were true copies of the oaths of the surveyors, remaining in the office of the clerk of the township.

W. Halsted for the prosecutor of the *certiorari*, relied upon several reasons for setting aside the proceedings, and among others, because it did not appear that the surveyors had taken the oath of office, which they are required by the statute incorporating townships (*Rev. Law 343, sec. 19*) to take before some justice of the peace residing in or near the township. The oath which was taken was as follows, viz.

"I, A. B. do solemnly and sincerely promise and swear, that I will in all things to the best of my knowledge and understanding, well and faithfully execute the office of a surveyor of the highways, without favour or partiality.

(signed)

A. B.

Sworn before me this 10th April, 1826.

WM. TINDALL."

This oath, he contended was defective: 1. Because it did not appear upon the face of the affidavit where it was taken; there was no county or place mentioned in any part of it. It was essential to its validity, that the jurat should state the place where it was sworn. 3 *Maul. & Sel.* 493. 1 *Bur. Trial* 97-8. The statute,

Rev. Law 343, sec. 19, required the oath to be taken before some justice residing in or near the township in which the surveyors were appointed. But it did not appear upon the face of the affidavit or elsewhere, that it was taken before a justice who resided even within the county. It might have been (for any thing that appeared) taken in another state.

Nov. 1828.

State
v.
Hatchinson.

2. The affidavit was defective, because it did not appear to have been taken before a justice. The person before whom it was taken, signed his name William Tindall, but did not annex to his name the words "justice of the peace," or J. P. or any abbreviation whatever to designate his office, nor was there any thing in the proceedings or evidence to shew that William Tindall, before whom the oath was taken, was a justice of the peace.

Hamilton, contra, objected to copies of the oaths of the surveyors being received in evidence, and insisted that the original oaths ought to be produced.

Then contended, 1. That in as much as the oaths of the surveyors followed precisely the form of the oaths given in the statute, they were sufficient.

2. That justices of the peace being officers appointed by the joint-meeting, and commissioned by the governor, this court would take judicial notice of the appointment of William Tindall as a justice of the peace for the county of Middlesex; and if the court would notice this fact, then, as every officer was presumed to do his duty, they would presume that the oath was taken within the county of Middlesex, and not out of his county.

The Chief Justice delivered the opinion of the court.

One of the reasons assigned for setting aside the return and proceedings in this case is, that two of the persons who acted as surveyors and signed the return, had not taken, subscribed, and filed the oath of office as required by law.

The oaths of office of these persons, are in the form set forth in the act of the legislature regulating the subject. They are subscribed by each of them respectively. The *Jurat* of each is in the following words: "Sworn and subscribed this 10th day of April 1826 before me, William Tindall." The act above mentioned directs that the person elected shall, before he enters upon the execution of the office, take and subscribe an oath or affir-

Nov. 1828.

State
v.
Hutchinson.

mation before some justice of the peace residing in or near the said township. A neglect or refusal to take, subscribe, and file such oath or affirmation within the time prescribed, is declared a refusal to serve, and the person appointed is unauthorized to discharge the duties of the office. It does not in any wise appear to us that the person before whom the oaths in question purport to have been made, was a justice, or that they were taken before him in that capacity. The papers as filed with the town clerk do not set out in the *jurat*, or in any other place, that he was a justice of the peace; neither in words at length, nor by the accustomed abbreviations, nor by any reference whatever. It is not shewn to us that he was, at or about the time of taking the oaths, in the performance of official acts: and if indeed he was appointed by the joint-meeting a justice, we are not to take judicial notice of the appointment, or that he accepted the commission and acted under it.

We are referred, by the counsel of the defendant, to the 20th section of the act respecting townships, which directs that the justice of the peace before whom the oath or affirmation is taken, shall certify under the said writing the day and year when taken, and subscribe his name thereto. All this, however, it will be observed, is to be done by a justice of the peace; and hence the objection retains all its force. For it is not asserted or shewn in the slightest degree, by any evidence, either within or without the papers, that the person who has made the certificates and signed his name, was a justice of the peace.

On the argument, the defendant's counsel resisted the evidence produced of these oaths of office; the originals, it was urged, instead of copies, should have been exhibited here. The original oaths are directed by law to be delivered to the clerk of the township, to be filed. The papers produced are proved by the affidavit of the clerk for the current year, to be true copies of the oaths of office of the surveyors chosen in the year 1826, remaining in his hands as clerk, and delivered to him as such by his predecessor in that office. They are also proved by the affidavit of the preceding clerk, to be true copies of the oaths of office of the surveyors of that year, delivered as such to him, as town clerk, and by him delivered to his successor, and that no other papers were delivered to him as oaths

of office of surveyors for that year. Such sworn copies were competent evidence without the production of the originals. Nov. 1828.
1 Starkie Ev. 156. McCourry
v.
Suydam.

The reason assigned for setting aside the return and proceedings, is, in our opinion, sustained in law and fact.

BENJAMIN MCCOURRY against THOMAS C. DOREMUS AND JAMES SUYDAM.

10	945
61	145
10	245
66	252

IN ERROR.

If the charter of a corporation, provides that all shares of its capital stock shall be transferrable on the books of the company, in such manner as the by-laws shall ordain, no legal transfer can be made until it provides books, and ordains by-laws for the transfer of its stock; and until then no legal demand on a person to transfer shares can be made.

Proof of placing in the post office, a letter containing a notice of trial, directed to the defendants' attorney, residing in a post-town, in due season to be received, the legal period prior to the day of trial, will, if made in the presence of the defendants' attorney, and until repelled, raise a presumption, and stand for proof of the service of notice.

But this presumption may be repelled by the affidavit of the attorney to whom the notice was directed, stating that it was not received.

The refusal of a court to continue a cause after it is at issue, is not a matter upon which error can be assigned.

In making return* to a writ of error, the schedule should contain simply a transcript of the record from the book of judgments.

FRELINGHUYSEN, for plaintiff in error.

W. Chetwood, for defendants in error.

EWING, C. J. The questions in this cause come before us, on bills of exceptions, taken upon the trial in the court of Common Pleas of the county of Morris.

One of the bills exhibits the following case: Doremus and Suydam placed in the hands of McCourry \$300, for the purpose of subscription to the stock of the Morris Canal and Banking Company; for which he gave a receipt in these words: "Received, New-York, April 26, 1825, of Doremus and

* NOTE. See the form of a return to a writ of error, from the Court of Common Pleas. *Tidd's Appendix 355, Sec. 22. Archbold's Forms 227. 10 Went. Plead. 361.*

Nov. 1828.

McCourry
v
Suydam.

Suydam, three hundred dollars, to be used by me in subscribing to the capital stock of the Morris Canal and Banking Company, the subscription to be in my name and for their benefit." McCourry subscribed for 30 shares, and paid the first installment thereon of 10 per cent., or \$300. The subscription to the stock was made on the 26th of April, 1825. The directors were chosen on Saturday the 4th of June, 1825, and their first meeting was held on Tuesday the 7th day of that month. On Monday the 6th of June, Doremus and Suydam demanded of McCourry, at Morristown, a transfer of the shares, which he refused. Evidence was given that on the 6th and 7th of June, sales could have been made in the New-York market at eight per cent. advance. The premium sunk before the end of the month to 2 1-2 per cent. On the 2d of July, sales were made at par; after which, the price underwent a continued and considerable depreciation. One of the witnesses, who was one of the commissioners to receive subscriptions, testified that "he did not conceive a proper transfer could be made until the transfer book was made;" that before the election of directors he "transferred some shares, but done confidentially, and did not make the transfer until there was a transfer book for that purpose, which was 2, 3, 5 or 7 weeks after." Another witness, a stock broker of the city of New-York, testified to a number of sales between the 26th of April and the 25th of May, and said, "the transfers were made by means of a certificate with a power of attorney attached, and by purchasers that was deemed satisfactory; a certificate, with a power of attorney attached, is considered by purchasers a satisfactory evidence of a title, and upon that certificate and power being delivered, they pay the amount in money." The defendant called on the court to charge the jury that the demand of stock, proved to have been made, was not a legal and sufficient demand to support the plaintiff's action. But the court refused, and charged the jury that the demand was legal and sufficient, to which the defendant excepted. A verdict was rendered for the plaintiffs for \$450. The precise time at which the action was commenced does not appear, but it was soon after the demand, and prior to the 28th of the same month.

The question presented for our consideration is, whether the charge of the court was legal and correct.

The receipt delivered by the defendant to the plaintiffs con-

Nov. 1898.

M'Courry
v.
Buydam.

tains no stipulation or agreement respecting a transfer of the shares, nor concerning the time when it should be made or might be required; nor does it appear by the evidence that any agreement on this head was entered into by the parties. Hence the demand became a material subject of consideration. No right of action could exist until a legal demand was made, until a demand was made at such time and under such circumstances as that the defendant was not only bound, but able in law and fact to make the transfer. By the 10th section of the act incorporating the Morris Canal and Banking Company, it is enacted, "that all shares of the capital stock at any time owned by any stockholder shall be transferable on the books of the company in such manner as the by-laws shall ordain." Now, until the company had books and until by-laws had ordained the manner in which shares should be transferred, no legal transfer could be made, and consequently no legal demand on the defendant to transfer the shares in question. But the demand, on which, if at all, the action of the plaintiffs must be sustained, for no subsequent demand was alleged or proved, was made on the 6th of June, prior to any, even the first, meeting of the directors, and therefore necessarily prior to any regulations or by-laws. On the 6th of June, then, the defendant could not make a transfer, and a demand at that time must therefore be nugatory and inoperative.

The practice of the New-York stock market, as testified by one of the witnesses, can have no weight on this question. We are to seek what was required by the grave and steady rule of law, not what would satisfy the eagerness of speculation, grasping its object on one hand with bold temerity and parting from it on the other with suspicious haste. A mournful history tells us there were at that time in the stock market many practices which neither the law nor good morals could uphold.

The charge of the court was in my opinion incorrect.

Upon another bill of exceptions, error is assigned in the order of the court for the bringing on of the trial of the cause. When it was called from the paper of causes furnished by the clerk, the defendant's attorney objected to the trial because notice had not been given. An affidavit of the plaintiffs' attorney was read that he had put into the post office at Newton in Sussex county, a letter containing a notice of trial, addressed to the attorney of the defendant at Morristown, the place of his residence. Also an af-

Nov. 1828.

M'Courry

v.
Saydam.

affidavit of the postmaster at the latter place that a single letter was received at his office, post marked at Newton on the 3d of April 1826, postage unpaid, but to whom addressed he did not know, nor did he state to whom it was delivered, nor how it was disposed of. An affidavit of the attorney of the defendant was then read that he had not received the letter nor any notice of trial in the cause. The court ordered the trial to come on.

In making this order the court erred. The plaintiffs were not entitled to bring on the trial. Proof of placing in the post office a letter containing a notice of trial, directed to the defendant's attorney residing in a post town, in due season to be received the legal period prior to the day of trial would, if made in the presence of the defendants' attorney, and until repelled, raise a presumption and stand for proof of the service of notice. The affidavit of the defendants' attorney that he had not received the notice, entirely destroyed the presumption and left the plaintiffs without any proof of service. Putting a letter into the post office is not, in itself, service. It only raises a presumption of service which is neutralized and destroyed by another, to the contrary, of equal weight; and such other is found in the affidavit of the defendant's attorney. The plaintiff in transmitting his notice by mail, takes on himself the entire risk of delay or miscarriage, and cannot require the defendant to bear the slightest portion of it. *Qui sentit commodum sentire debet et onus.*

I have examined the contents of this bill of exceptions, and the sufficiency of the proof of notice, because I have thought it important the opinion of the court on this topic should be expressed, as well to guide us at the circuits as to furnish a rule to the courts of Common Pleas, who may believe our opinions to be correct. To avoid misunderstanding, however, it is proper to add that while I admit there are strong points in the argument of the plaintiffs' counsel, and hold in great respect the opinion and reasoning of the venerable Chief Justice Tugman, as reported in 4 *Serg. & Rawle* 480, I consider it to be well and long settled that the error of the court below, as exhibited in this bill of exceptions, is not a ground for reversal upon a writ of error. Without entering into a full and argumentative discussion of the subject, I shall content myself with stating the doctrine as I find it laid down by the Supreme Court of the United States in the case of *Wright* against the lessee of *Hollingsworth*, de-

terminated at the last term of that court. 1 *Peters* 168. "The allowance or refusal of amendments in the pleadings; the granting or refusing of new trials; and, indeed, most other incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This it is true may occasionally lead to particular hardships, but on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings, in suits between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly it was held by the court in *Wood v. Young*, 4 *Cranch*, 237, that *the refusal of the court below to continue a cause, after it is at issue is not a matter upon which error can be assigned*: that the refusal of the court below to grant a new trial, is not matter for which a writ of error lies, 5 *Cranch* 11 and 187, and 4 *Wheat*. 220; and that the refusal of the court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to *continue a cause*, cannot be assigned as a cause of reversal on a writ of error."

Nov. 1828.

McCourry
v.
Suydam.

This case affords us an occasion to notice, and we use it under an hope it may be profitable, the laxity which prevails in some of our proceedings, a laxity which loudly calls for correction, which is beginning to develop its mischiefs, the extent and number of which may justly excite fearful anticipations. Thus in the record of the judgment before us, the entry of the verdict is, that the said Benjamin McCourry did assume and undertake in manner and form, &c. and they assess the damages of the said Thomas C. Doremus and James Suydam as aforesaid, sustained by reason of the premises aforesaid," at four hundred and fifty dollars besides costs; that is to say, the damages sustained by reason of the promise and undertaking of the defendant, not by reason of his nonperformance thereof. Again: The costs of increase are not inserted, but a blank space left, and of course, the *in toto attinguat* clause contains no sum, but a blank where the sum should be found. Again: In making return to the writ of error, the schedule, instead of containing simply a transcript of the record from the book of judgments, is in the ordinary form of an exemplification, and then follow, a copy of the entry

Nov. 1828.

Sheppard

Sheppard.

usually made on the minutes of the court directing due return to be made to the writ; and a formal certificate of the clerk that the entry is truly copied; and a second time, the seal of the court is affixed. The latter copy, which ought never to be sent, is probably designed as a substitute for a proper return by the court; the return in this case having the signature of the clerk, instead of one or more of the judges. Having mentioned these matters it may not be amiss to observe that they have no influence on the reversal of the judgment.

Judgment reversed.

FORD, concurred.

DRAKE, J. did not sit in this cause, having been concerned as counsel of one of the parties.

CHARLES SHEPPARD AND BENJAMIN SHEPPARD *against* PROVIDENCE L. SHEPPARD.

IN TRESPASS.

In an action of trespass brought by A. and B. against C. for taking out of their possession a quantity of ship plank, sold to them by D. C cannot give in evidence a judgment against D. (with the execution thereon) entered by confession under the statute, (*Rev. Laws 634, sec. 18,*) in an action instituted before a justice of the peace without process, and without such an affidavit as is required by the act.

Such a judgment, although valid between the parties, has no operation against third persons, and cannot be read in evidence even in mitigation of damages.

An affidavit which does not conform substantially to the words of the act, is the same as no affidavit.

This court will not grant a new trial on account of the discovery of new and important evidence, if such evidence might with ordinary diligence have been discovered previous to the trial.

This court will not grant a new trial on account of newly discovered evidence, unless the facts newly discovered are laid before the court in the shape of legal evidence and not hearsay.

THIS was an action of trespass tried before his Honour the Chief Justice, at the Cumberland circuit, and a verdict for the plaintiff. A rule to shew cause why the verdict should not be set aside, was obtained and argued by

D. Elmer, for plaintiffs.

L. Q. C. Elmer, for defendant.

FORD, J. This was an action of trespass for taking a quan-

10	2501
64	438

Nov. 1828.

Sheppard

Sheppard.

ity of ship plank and three sawing gins out of the possession of the plaintiffs, which they claimed under a bill of sale from Robert Irwin and Co. dated the 6th of December 1825. The defendant set up a prior right under a judgment and execution against the same Robert Irwin and Co. of the 5th of December 1825, which was one day older than the aforesaid bill of sale. On an inspection of the record, it appeared that the judgment had been entered on confession of Robert Erwin in the absence of his partners, to an action of Providence L. Sheppard and Richard L. Wood, instituted before a justice without process, on the 5th of December, and that an execution was issued and returned, levied on the property in question the same day. An affidavit of Richard L. Wood, accompanied the proceedings in the following words—"that the judgment which Robert Irwin hath, for and in behalf of the firm of Robert Irwin and Co. this day confessed for \$40.20, is justly owing from said firm of Robert Irwin and Co. to Providence L. Sheppard and Richard L. Wood, and that the same is not done to *cover property* or defraud creditors." The judge at the circuit considered this affidavit not to be such as the statute of 29th of January 1817 required to be made, for which reason the judgment and execution were not allowed to be given in evidence. The right set up by the defendant consequently failed; but as there was evidently a claim and color of title under which the defendant acted, the judge directed no more than the strict value of the property to be given as damages; and under this charge the jury found a verdict of \$480 for the plaintiffs. The defendant moves to set aside this verdict and grant a new trial on three grounds.

First, because the above judgment is not void but only voidable; it remains valid until it shall be reversed, and therefore ought not to have been overruled. The act is entitled "an act to prevent the fraudulent confession of judgments." It enacts that when parties agree without process, to enter an action before a justice of the peace, no judgment by confession shall be entered without an affidavit of the plaintiff, his attorney or agent, of the true cause of action, setting forth that the debt is *bona fide* and justly due and owing to the person or persons to whom the judgment is to be confessed, and that the said judgment is not confessed to answer any *fraudulent purpose*, or to *protect* the property of the defendant from his creditors. Now this affidavit ob-

Nov. 1828.

Sheppard
v.
Sheppard.

viously falls short of what the statute requires. In the first place it does not state the *cause of action*; the inference from which is, there was none or the plaintiff would have set it out in compliance with the act; the court certainly cannot presume a cause of action where none appears. Secondly, it does not assert that the debt is *bona fide*, nor that any debt in fact exists; it says the judgment is justly owing which must always be the case after confession, whether there was a real debt or only an allowed pretence. Thirdly, it entirely omits the important clause that the judgment is not confessed to answer any *fraudulent purpose*. Fourthly, it says the judgment is not confessed to *cover property*, yet an execution in pursuance of it is spread over the property the same day, and in a few hours afterward the same property is sold to *bona fide* purchasers who had no notice of the proceeding. Now an affidavit not according to the act is the same thing as no affidavit; in which case the law has been heretofore fully settled in this court. In 1 South. 161, *Parker v. Griggs*, a judgment being confessed without process or affidavit, the court held it to be void, declaring that the justice had no power to act. There was a similar case in 2 South. 479, of *Cliver v. Applgate*, where two judges considered the judgment so void that an execution in pursuance of it would be no justification to an officer for executing it. The *Chief Justice* did not go the full length of this opinion; but he held that the judgment being entered without the affidavit prescribed by the act to prevent fraudulent judgments, it must be considered fraudulent. Now whether it is void as the majority decided, or fraudulent in law as the other supposed, the result is the same, for in neither case could it be given in evidence. It is true, that this law has been since modified, by a subsequent one of the 12th of February 1818, (*Rev. Laws 634, sec. 18*) whereby such judgment is made binding on "the parties in the suit," but that it shall not *operate* nor have any *effect* against persons "not parties in said action." Now there was no way to bar its operation against these plaintiffs, who were not parties in that suit, but by rejecting it as any evidence against them. The defendant's counsel argued from its being valid against the parties, that it must be equally so against those claiming under them; whereas one great object of the act was to protect purchasers, who are in fact creditors, against fraudulent judgments; an object that would be signally

defeated by allowing them operation and effect against *bona fide* purchasers without notice as in this case.

Nov. 1828.

Sheppard,
v.
Sheppard.

Secondly—Supposing the judgment and execution were inadmissible evidence of title, they ought to have been received, it is said, in mitigation of damages, as shewing that the defendant did not act maliciously or wantonly, or from purposes of wrong or oppression, but under a claim of title and an honest impression of right. But to admit the evidence even in this view, would have allowed the judgment to have some operation and effect, contrary to the express words of the statute, which declares they shall have none. Neither was there the least necessity for it; the production and rejection of the judgment and execution concurred with all the evidence in the cause, to shew that the defendant acted under a claim of right, and that there was no ground for giving exemplary or vindictive damages. The defendant had a right to have his claim tried; the court therefore directed the jury to make the fair *value of the property* the measure of damages. If the evidence had been received in mitigation, it ought to have had no effect beyond what the court gave in charge. Thus without contravening the statute, the defendant had all the benefit of mitigation to which he was entitled. But it is objected that the jury acted contrary to this charge; that their verdict gives a sum nearly double the value of the property. The calculation to make this probable, is however liable to much objection; it is founded on the testimony of but a single witness, himself the agent of the defendant; one who did not measure the timber himself, so as to swear to the quantity, nor did he examine the quality carefully, till a considerable time after the removal, during which time the unsoundness had been in progression; he did not see either the quantity or quality at the time of seizure; whereas the clerk of the plaintiff's wharf and business, corroborated by a number of other witnesses, some of whom had been employed in hauling the timber together, and others in piling it stick by stick, made estimations under oath, so widely different from the other, that there is as good reason to fear the jury went below the true value as above it.

The third and last ground offered for a new trial is the discovery of new and important evidence, not known to the defendant at the former trial, nor then in his power. The witness referred to is Robert Irwin, the person who confessed the judg-

Nov. 1828.

Sheppard
v.
Sheppard.

ment, who afterwards made the bill of sale, who invented the whole fraud, who remained on the spot till within a month of the trial, and then absconded. It was certainly a gross neglect of the defendant not to inquire the circumstances of the case from this man, who obviously knew all about them, till after the trial was over. The party not only might but ought to have known of his evidence, and to have taken his deposition or put off the trial to procure his attendance. In the case of *Deacon v. Allen*, 1 South. 343, the court said, that if a party has carelessly permitted himself to remain ignorant of the best means for his defence, this court will not set aside a verdict to save him from the effects of his own indolence. This Robert Irwin is to swear, as is said, that he told the plaintiffs there was an execution levied on the property before he gave them the bill of sale. The evidence of it is that a Mr. Harman swears he has heard Irwin say so. Facts newly discovered ought to be laid before the court in the shape of legal evidence and not hearsay. Many men say things which they dare not confirm under oath. We ought to have more substantial ground for setting aside a verdict than a hearsay. I do not know a case where it was ever allowed, but there are many to the contrary. In *Coppin's case*, (cited 3 *Morg. Law Essays* 4,) a cause came on at seven o'clock in the morning, and an old witness could not be there time enough; the court refused a new trial unless he would make affidavit of what he knew. In *George v. Price*, 7 *Mod.* 31, it was sworn, that one of the witnesses said, since the trial, that he got a guinea to stifle the truth; the court said an affidavit of him who got the guinea were something, but his saying is nothing. In *Aylett v. Jewell*, 2 *Bl. Rep.* 1299, a new trial was moved for on an affidavit that one of the jurymen had confessed a great irregularity in the conduct of the jury; but there being no affidavit of the jurymen who knew the fact, the court said it was too dangerous to call a verdict in question upon so loose a suggestion. In 4 *Johns.* 485, the affidavit stated what a person told the party he would say; the court said, there can be no reliance on such declarations. On the whole I perceive no legal ground for a new trial, and therefore let the rule be discharged.

The Chief Justice concurred.

DRAKE, J. The affidavit filed in this action is clearly defec-

live, inasmuch as it does not state the *cause of action*. And, although I am not satisfied that the operation of a judgment entered by confession without affidavit, or upon a defective one, should be confined to the immediate parties to it, and that it cannot under any circumstances be used against third persons; and doubt the propriety of rejecting the evidence overruled in this cause; yet, as it afterwards appeared satisfactorily that the plaintiffs were *bona fide* purchasers, and therefore ought not to have been affected by the said evidence if it had been admitted. I concur with my brethren in refusing a new trial.

Nov. 1828.

Dancer
v.
Craven.

Judgment on the postea.

GEORGE DANCER *against* JAMES PATTERSON AND RICHARD CRAVEN.

Upon a *certiorari* to the Common Pleas, to remove the proceedings on an appeal from the judgment of a justice; this court may inspect the transcript of the justice for the purpose of ascertaining a fact which occurred in the proceedings before him.

A statement on the transcript of the justice, that the counsel of the defendant "relied on the statute of limitations, as a bar to the demand of the plaintiffs, and that no evidence of a promise or acknowledgment had been proved to have been made by the plaintiffs within six years" is, insufficient to shew that no evidence of a promise or acknowledgment was proved, or to prove error in the court below, in refusing the defendant the benefit of the statute of limitations.

R. P. THOMPSON, for plaintiff.

Wm. N. Jeffers, for defendant.

The Chief Justice delivered the opinion of the court.

The reason assigned by the plaintiff in *certiorari* for the reversal of the judgment is, that the Court of Common Pleas overruled the defence he raised on the statute of limitations.

To establish this reason, in point of fact, he refers to the transcript of the record in that court, returned with the *certiorari*, which, for such purpose, the defendant insists, he may not use. We are of opinion, however, that we may lawfully inspect the transcript. It comes to us under the sanction of the Court of

Nov. 1838.

Dancer
v.
Craven.

Common Pleas, and is sent here in answer to the writ of *certiorari*, requiring the judgment and proceedings to be certified to this court. To its contents, therefore, under such sanction, full faith is due.

But upon looking into the transcript we find no matters of fact to evince the alleged error in law of the Court of Common Pleas. The whole case upon the evidence is not stated; nor any thing but the points which were insisted on by the counsel of the respective parties. The counsel of the appellant, it is said, "relied on the statute of limitations as a bar, to the demand of the appellees, and that no evidence of a promise or acknowledgment had been proved to have been made, by the appellant within six years. The counsel for the appellees contended that as the statute of limitations was not pleaded by the appellant before the justice, he could not have advantage of it," on the appeal. In the analogous case of an entry on a justice's docket, of the points taken before him on a motion for a non-suit, this court has repeatedly resolved that such entry is no proof that the facts stated in the points existed in the evidence. *Longstreet v. Little, Penn. 1031.* The Court of Common Pleas may have been of opinion that the position assumed by the counsel of the appellees was wholly untenable, and the appellant at liberty to insist upon the statute. At the same time, they may have been of opinion there was sufficient evidence of a promise or acknowledgment. What is such sufficient evidence is well known to be a vexed question. And the court may have, perhaps rightly, differed from the conclusions of the appellant's counsel. The grounds on which the court did actually decide are not set forth in the transcript.

We have not then sufficient before us to discover any error in the court below. A more full statement might have been obtained, at the instance of the plaintiff in *certiorari*. In its absence, any presumption we make is to be in support, not in destruction, of the judgment.

Let the judgment be affirmed.

THE INHABITANTS OF THE TOWNSHIP OF NORTH BRUNSWICK
against NICHOLAS BOORAEM AND OTHERS.

Nov. 1898.

Inhabitants.
v.
Booraem.

The court have power in a proper case to set aside or strike out a plea.

That the attorney of the plaintiff has no authority to prosecute the suit, is not the proper subject matter of a plea. The proper mode for the defendant to take advantage of such a fact is, by motion to the court, to stay proceedings.

GEORGE RICHMOND, for plaintiff.

J. W. Scott, for defendant.

The Chief Justice delivered the opinion of the court.

This action is brought on a bond given by a constable and his sureties, conditioned for his faithful performance of the duties of his office. Bonds of this nature are made to the inhabitants of a township in their corporate name and capacity, are filed with the clerk of the township, and the township committee are required, if need be, to prosecute them for and in behalf, and to the use of all and every person or persons whatever, who may have sustained loss by the neglect or misconduct of the constable. *Rev. Laws 644, sect. 58.*

One of the pleas filed in this case is, "that this suit is not prosecuted by the township committee of North Brunswick, in the county of Middlesex, against the said defendants, but by one Joseph Marsh in the name of the inhabitants of the township of North Brunswick, in the county of Middlesex, against the said defendants, without right or authority."

The plaintiffs have moved to set aside or strike out this plea. The defendants insist that the plaintiffs if they would except to the sufficiency in law of the plea, should be put to demur.

The power of the court, in a proper case, to set aside a plea, was rightly conceded by the defendants' counsel, and has heretofore been recognized in this court. *Westervelt v. Merenus, Penn. 893. Anonymous, 2 Halst. 160. Coryell v. Croxall, 2 South. 764.* The substance of the present plea is, that the attorney of the plaintiffs had no authority to prosecute this suit, being retained by one Joseph Marsh, and not by the township committee. Such matter is not the proper subject of a plea. No precedent of the kind is any where to be found. If the township committee are dissatisfied, they may apply and have the pro-

Nov 1828.

Inhabitants
v
Booraem.

ceedings stayed. And if the defendants properly verify the allegation that an attorney, is to their vexation, without authority, using the name of the plaintiffs and the process of the court, we shall promptly interfere for their protection. But in both cases, the proceedings will be summary, by motion and rules. Such being the regular mode of relief, the defendants are not permitted to resort to a plea ; nor are the plaintiffs to be subjected to the delay and expense of a demurrer to dispose of a plea of this nature. In the same manner, if a defendant should plead a set off, which by our statute is the subject of a notice and not of a plea, the court would set it aside on motion and not require a demurrer.

The counsel of the defendants strongly urged, that to set aside the plea without putting the plaintiffs to demur, is to deprive them of the means of reviewing in a higher tribunal, the decision which may be made on the legal sufficiency of the matters contained in the plea. If so, the case falls within a very numerous class which the wisdom and policy of the law require to be disposed of in a summary manner. And although inclined to facilitate, not to discourage, the privilege of review, we are notwithstanding bound to adhere to the established course of practice.

Let the plea be set aside.

CASES
DETERMINED .
 IN THE
SUPREME COURT OF JUDICATURE
 OF THE
State of New-Jersey,
 FEBRUARY TERM 1829.

DEN *ex dem.* ZOPHAR HETFIELD against MOSES JAKUES.

Where lands descended, are *bona fide* aliened by the heir before suit brought, they cannot be taken in execution on a judgment against the heir for a debt of his ancestor.

10	250
55	418
51	96

And a mortgage, by the heir of the lands descended, before suit brought, is considered as an alienation, within the meaning of the statute.

The fact that the mortgagee, knew at the time when he took the mortgage, that the land had belonged to the decedent, and that the decedent left debts unpaid, would not, of themselves, be evidence of bad faith in the mortgagee.

THIS was an ejectment tried before his Honour the *Chief Justice* at the Middlesex circuit in December 1826, and came before this court upon a case stated, by his Honour the *Chief Justice*, and agreed to by the counsel of the parties, in the following words, *viz.* "Middlesex circuit, December 1826."

Scudder read the transcript and opened the case on the part of the plaintiffs, the declaration is of November term 1826, for 100 acres, &c. in the township of Woodbridge, on the demise of Zophar Hetfield, made on the 1st June 1826, to hold from that day, &c. and ouster on the 2d June 1826.

The premises in question are, a tract of about 60 acres of land situate in the township of Woodbridge.

Admitted that John O. Jaques died, seized of the premises in

Feb. 1829.

Den
v.
Jaques.

question in the year 1816 ; that he left the following children and heirs at law, viz. Thomas F. R. Jaques, Samuel Jaques, Annabella wife of Jonathan B. Marsh, John D. Jaques, Eliza, wife of Lewis Roberts, Margaret wife of Jacob Oliver, Mary Jaques, Charlotte Jaques, James Jaques, George Jaques and Martha Jaques.

The plaintiff's counsel then read in evidence, a deed dated 17th November, 1824, from Charles Carson, esq. sheriff of the county of Middlesex, to Zophar Hetfield, the lessor of the plaintiff, for a tract of 80 acres, more or less, situated in the township of Woodbridge, being the premises in question. This deed recites a sale made at public vendue on the 8th November 1824, by virtue of executions issued on three judgments in the Supreme Court, against Samuel Jaques, Jonathan B. Marsh, and Annabella his wife, John D. Jaques, Lewis Roberts, and Eliza his wife, Jacob Oliver and Margaret his wife, Mary Jaques, Charlotte Jaques, James Jaques, George Jaques, and Martha Jaques, heirs at law of John D. Jaques, dec. One of said judgments was of November Term 1823, at the suit of the executors of Joseph Shotwell, for \$1815.19, the penalty of a bond. The 2d thereof was of May Term 1824, at the suit of Uzal O. Marsh, for \$440.79. And the 3d thereof of May Term 1824, at the suit of Zophar Hetfield, for \$1400.79.

Agreed by the counsel that these judgments and executions be considered as read in evidence, and that if this cause should go to the bar of the Supreme Court, all objections to discrepancies between the judgments and executions recited, and those to be there produced, shall be open to the parties respectively, and such objections to have the same effect as if now made.

Admitted, that the defendant is in possession of the premises in question, and was so at the commencement of this suit. Lease, entry and ouster, confessed.

Plaintiff rested.

Mr. *Frelinghuysen* opened for defendant.

The defendant's counsel then read in evidence :

1. A deed dated 8th September, 1818, recorded 14th June, 1820, from Thomas F. R. Jaques to John D. Jaques, in consi-

deration of \$825, for all his estate, right, and interest, &c. in the premises in question, and other lands.

Feb 1822.

Den
Jaques.

2. A deed dated 8th May, 1820, and recorded 14th of June, 1820, from Samuel Jaques and Ann his wife, to John D. Jaques, in consideration of \$600, for all his estate, right, and interest, &c. in the premises in question, and other lands.

3. A bond, the execution of which was admitted, dated 9th July, 1821, from John D. Jaques to Moses and D. R. Jaques, conditioned for the payment of \$1000.

4. A mortgage from the same, to the same, and of the same date, and containing the same premises as are contained in the two deeds last above mentioned, to secure the payment of the aforesaid bond.

5. A deed dated 27th July, 1824, from Charles Carson, esq. sheriff of the county of Middlesex, to Moses Jaques, for the premises in question, among other lands: this deed recites a sale made 9th June, 1823, on an execution issued on a judgment in the Supreme Court of the 12th November, 1822, in favour of the executions of Joseph Shotwell against John D. Jaques.

Agreed by the parties, that this judgment and execution be considered as read in evidence, and if this cause should go to the bar of the Supreme Court, all objections to discrepancies between the judgment and execution recited, and those to be then produced, shall be open to the parties respectively, and such objections to have the same effect as if now made.

Defendant rested.

Admitted, at the request of the plaintiff's counsel, that the aforesaid John D. Jaques and the defendant, are distantly related by blood, and that he married a niece of defendant.

Admitted, that pending an action of the executors of Joseph Shotwell, against the administrators of the aforesaid John O. Jaques, and before the commencement of the suit by the said executors against the heirs of the said John O. Jaques, in which the aforementioned judgment was obtained, Moses Jaques, the present defendant, paid to the said executors the amount of their claim against the administrators, and thereby became equitably entitled to the benefit of the said claim, and that at the time of the sale made by the sheriff, under the execution

Feb 1829.

Don
v.
Jaques.

above mentioned, against the said heirs, the money to be raised by the said execution was equitably due and payable, and was afterwards paid to the said Moses Jaques, the defendant.

A verdict was taken for the plaintiff by consent of the parties, subject to the opinion of the Supreme Court, upon the foregoing case: If the plaintiff is entitled to recover, judgment to be entered for him with costs, and the verdict and judgment to be modified as to the quantity or proportion, if any, to be recovered according to the opinion of the said court.

If the plaintiff is not entitled to recover, the verdict to be set aside, and judgment, as in case of non-suit, with costs, to be entered.

Either party to be at liberty to turn this case into a special verdict, for the purpose of a writ of error.

Scudder and Chetwood, for the plaintiff.

Hornbloeuer and Frelinghuysen, for the defendant.

EWING, C. J. The premises which the plaintiff seeks to recover in this cause, are three undivided ninth parts of a farm of about eighty acres of land, in the county of Middlesex, of which John O. Jaques was seized and possessed at the time of his decease intestate in the year 1816.

John O. Jaques, at his death, was indebted upon a bond to Joseph Shotwell. Judgment was obtained in an action on this bond, in February term 1821, by the executors of Joseph Shotwell, against John D. Jaques and Randolph Jaques, administrators of John O. Jaques. On this judgment an execution was issued, and return was made to the term of May 1821, that the administrators had no goods and chattles of the deceased in their hands, to be administered. An action was afterwards commenced in this court, by the executors of Joseph Shotwell, against John D. Jaques, Samuel Jaques, and others, heirs at law of John O. Jaques, by process of summons returned to May term 1823, and judgment was obtained in November term following, for the debt and costs "to be levied of the lands and tenements, which were of the said John O. Jaques, deceased, in fee simple at the time of his death, which came to, and now is in the hands of the defendants by hereditary descent from the said John O. Jaques, deceased." An execution was issued, commanding the sheriff to

Feb. 1820.

 Den
v.
Jaques.

make the debt and costs of the lands and tenements whereof the said John O. Jaques died seized in fee simple in the hands of "the defendants, or in the hands of any or either of them." This execution was returned to February term 1824, "levied on all the lands and tenements whereof John O. Jaques died seized, to wit, a farm situate &c. containing eighty acres more or less," &c. which is the farm already mentioned, and of which the premises in question are part. In May term 1824, two other judgments were obtained against the heirs, one at the suit of Usal O. Marsh, and the other in favor of the lessor of the plaintiff in this cause. Under these three executions, the farm was sold on the 8th of November 1824, and a deed of conveyance was made on the 17th of the same month, to the lessor of the plaintiff.

By virtue of this deed he seeks to recover, the three ninth parts of the farm, the premises in controversy.

The evidence exhibited on the part of the plaintiff shews, *prima facie* a title to the premises, and right to recover in this action. Thus far indeed no difficulty or dispute exists. The questions raised in the cause, and argued by the counsel grow out of the matters relied on in defence; which we are therefore now to proceed to examine.

The defendant alleges that the plaintiff ought not to recover because at the time of the sale by the sheriff, and of the judgments which are supposed to have authorised it, the title to the three undivided parts was incontrovertibly vested in him; and in the following manner: On the 8th of September 1818, after by the decease of John O. Jaques, intestate, the inheritance descended to his heirs at law, one of them, Thomas F. R. Jaques, in consideration of \$825, conveyed one ninth part, being his share to John D. Jaques. On the 8th of May 1820, Samuel Jaques, another of the heirs, in consideration of \$600 conveyed another ninth part to the said John D. Jaques. On the 9th of July 1821, the said John D. Jaques mortgaged, the ninth part which came to him by descent, and the two ninth parts which he held by purchase to the defendant to secure the payment of a bond for \$1000. In November term 1822, judgment in this court was obtained by the executors of Joseph Shotwell against the said John D. Jaques, surviving administrator of John O. Jaques, on a *devastavit*, founded on the above mentioned judgment

- Feb. 1829.

Den
v.
Jaques.

of February term 1821. Execution of *fiery facias de bonis et terris* was issued, was levied on three undivided ninth parts of the above mentioned farm described as "late the property of John O. Jaques, deceased," and was returned to February term 1823. On the 9th of June 1823 a sale was made, and on the 27th of July 1824 a deed was executed by the sheriff to the defendant for the three ninth parts among other lands.

And thus, as the defendant insists, a title is shown in him, paramount to the title of the plaintiff.

The first question which presents itself is, were the premises in controversy liable to the judgments and executions against the heirs under which the sale was made or either of them.

According to the common law, if lands descended to an heir, were *bona fide* aliened by him before the commencement of an action against him for a debt of his ancestor, the lands were not liable to be taken in execution. Nor was the debt then recoverable at law against the heir himself. By such alienation both the heir and the lands were placed at law out of the reach of the creditor. If however the alienation was not *bona fide*, or was made after the commencement of the suit, or after the original purchase, as the older books express it, the lands were chargeable and might be taken in execution under the judgment against the heir. *Co. Lit.* 102. a. 3 *Bac. Abr. tit. Heir & Ancestor* 26. This hardship on the creditor of the ancestor was remedied in England by the statute of 3d. & 4th. *Wm. & Mary, C. 14*. The heir was made liable, to the value of the lands descended, if he aliened them, even in good faith, before the commencement of the suit. The lands, as before, remained liable if aliened *mala fide* or after the writ was sued out against the heir. In the revision of our laws, by Judge Patterson, this statute of *Wm. & Mary* was adopted in very nearly the words of the original. The second section, *Patt. 243, Rev. Laws 291*, directs that "execution shall be taken out upon any judgment so obtained against such heir or heirs to the value of the said lands, tenements, or hereditaments as if the same were his, her, or their own proper debt; but the lands, tenements, and hereditaments which were *bona fide* aliened, before the action brought, shall not be liable to such execution."

From a view of this statute it is seen, then, that the question proposed will depend on the solution of another. Were the prem-

Feb. 1829.

 Den
v.
Jaques.

ises in question *bona fide* aliened by the heirs to whom they descended, before the action by the executors of Shotwell was brought against them?

And here the topics of inquiry being now distinctly disclosed, it is proper to remark that the point decided by *Chancellor Williamson*, in the case of *Parret v. Van Winkle*, which was read on the argument by the defendant's counsel, is different from the matter in question before us. There the strife was between a mortgage by the heir, and a sale by the administrator, under an order of the Orphans' Court subsequently obtained; and the Chancellor decided that a purchaser at such a sale could not wrest the land from the holder of a *bona fide* mortgage made prior to the order. In the present case the preference is to be settled between a mortgage by the heir and a judgment and execution against him in his individual character on the one hand, and an action, judgment, and execution against him as heir on the other.

From the view of the facts which I have presented, it will be noticed that at the commencement of the suit against John D. Jaques and others, as heirs, he held the three shares now in question, subject to the mortgage he had made to the defendant, one by descent from his father, the others by purchase from his co-heirs. For the sake of clearness and order, it will be proper to keep distinct the shares he held by purchase from that he took by descent.

And first, of the two shares he purchased from his brothers: It has been shewn that lands aliened *bona fide*, prior to the commencement of a suit, are not liable to the execution which may be obtained in such suit against the heirs. Now it is a point of no difference to whom the alienation, if *bona fide*, is made, whether to a stranger or to one of the heirs. The pivot is alienation in good faith. These two shares, subject to the mortgage made to the defendant, were, at the commencement of the suit, held by John D. Jaques, not by descent or as heir of his father, but as alienee of his co-heirs. Was the alienation to him in good faith? I find, in the state of the case, no evidence to the contrary. The facts relied on are, that the property had belonged to the deceased, and that the alienee was one of the administrators. These facts are, however, equivocal. Both are consistent, and may well stand with fairness and in-

Feb. 1820.

Dea
v.
Jaques.

tegrity in the alienation. The alienation of these two shares was made before the commencement of the action against the administrators. The personal estate was the primary fund for the payment of debts. It may have been in the present case apparently sufficient to discharge them. Subsequent to the alienation, by unforeseen losses or other adventitious circumstances, the face of things may have greatly changed. I speak of these as matters which may have existed, without saying that they did exist; for the party whose interest it was to furnish evidence of bad faith, if it existed, which we are not allowed to presume, but the contrary, has given us no light on these topics. And if John D. Jaques paid upwards of \$1500 to his brothers for these shares, as the deeds avow, and which has not by proof been gainsaid, then a somewhat strong inference seems fairly to result, that he did not anticipate any jeopardy to these shares from the debts of the decedent. It is to be farther remarked, that as the matter appears on the documents before us, the alienation was not in satisfaction of an antecedent debt due from the alienor to the alienee, but an actual sale for a consideration in money paid. In *Parret v. Van Winkle*, Chancellor Williamson did not consider the fact that the land had belonged to the decedent as in itself evidence of bad faith in the mortgage. In *Meath v. Orrery*, 3 Atk. 235, and in *Nugent v. Gifford*, 1 Atk. 463, knowledge that the property assigned was assets, and the purchaser's knowledge of debts in general, were not of themselves, in the opinion of Chancellor Hardwicke, sufficient to affect the validity of assignments made for a valuable consideration, and when no collusion existed. Without going beyond the matters presented by the state of the case, I do not find in the alienations by Thomas and Samuel Jaques, badges of fraud or any facts on which a charge of bad faith can be sustained. It follows then, that these two shares or ninths of the premises in question, were *bona fide* aliened by the heirs to whom they descended before the action by the executors of Shottwell, was brought against them; and, consequently, they were beyond the reach of the execution issued on the judgment in that action.

On the 9th day of July 1821, John D. Jaques, as is set forth in the state of the case, mortgaged to the defendant Moses Jaques, to secure the payment of a bond of \$1000 from the

former to the latter, all his interest in the farm being the two ninths he held by purchase already considered, and the one ninth he held by descent. The latter remains to be examined.

Feb. 1822.

Den
v.
Jaques.

In the term of November, 1822, judgment was obtained in this court by the executors of Shotwell against John D. Jaques. On the 9th of June, 1823, a sale was made by the sheriff under an execution issued on that judgment; and on the 27th July, 1824, a deed was executed by the sheriff to the present defendant. By this sale and conveyance, the equity of redemption of John D. Jaques in the three ninth parts, became vested in the defendant, subject, however, to such right, if any, as the commencement previous to the sale of the action against the heirs, might have created in the one ninth part which John D. Jaques then held by descent; for in the language of *Chancellor Williamson*, the lien of the creditors attached upon the lands descended by the institution of the action against the heirs.

But as the mortgage from John D. Jaques to the defendant, was made long prior to the commencement of the action against the heirs, if that was an alienation in good faith, within the meaning of the act of the Legislature heretofore mentioned, it will afford a legal protection to the defendant, from any recovery in the present action. First then, to examine the question of good faith. The bond from John D. Jaques to the defendant, exhibiting a debt due from the former to the latter, is a part of the state of the case, and the existence and fairness of the debt have not been in any wise impeached. It may well be supposed that the defendant knew when he took the mortgage that the land had belonged to John O. Jaques, deceased, and the manner by which it came to John D. Jaques. But these matters have been shewn already to be insufficient to give the taint of bad faith to the transaction. And there is nothing in the case from which an inference can be drawn, that the defendant when he received the mortgage, knew there was any debt of John O. Jaques outstanding and unpaid; especially as the date at which the defendant became equitably entitled to the benefit of the claim of the executors of Shotwell against the administrators of Jaques, which in the state of the case, as originally prepared, was left somewhat vague and indefinite, has been since fixed by documents furnished to the court by the attorneys of the parties, and now to be taken as part of the state of the case, to have been the

Feb. 1823.

Den
v.
Jaques.

9th of June 1823, a day long subsequent to the date of the mortgage. It was however insisted by the plaintiff's counsel, that a mortgage is not an alienation within the meaning of the Legislature. For this doctrine I can find no support. A mortgagee is every where recognized as a purchaser *pro tanto*. *Cowp.* 278. 6 *John. Ch. Rep.* 433.

By means of the sheriff's deed, so far forth as it may extend, and by means of the mortgage, the defendant has shewn a valid, legal, and effectual defence against the present action.

But it is farther insisted, that as the defendant in June 1823, pending the action against the heirs became by purchase the real owner of the demand against them, and afterwards judgment being obtained, caused, for his benefit, the sale to be made, under which the lessor of the plaintiff claims, he cannot be permitted to say that by the sale no title was obtained to the three ninth parts which are in controversy. It is not however proved, nor even alleged, that the defendant used any fraudulent suppression or concealment, or made any false suggestions. The levy and sale were made and conducted in the ordinary manner, and of consequence, subject to the mortgage, if the mortgage was, as I have sought to shew, a subsisting *bona fide* alienation. If a creditor having two claims, one secured by mortgage, should under a judgment on the other, sell the mortgaged premises, it would be in vain to say he had thereby defeated his mortgage. Moreover in the present case, six ninth parts of the farm of the deceased John O. Jaques did, as no one in this cause has disputed, pass to the lessor of the plaintiff by the sheriff's sale and conveyance.

DRAKE, J. The history of the claim of Moses Jaques, the defendant, is briefly this, that in 1820, about four years after the death of John O. Jaques, from whom the premises in question descended, John D. Jaques, one of the heirs at law, and then owner of three shares of these premises, executed to the said Moses Jaques a mortgage thereon, to secure the payment of one thousand dollars. After which, finding the executors of Shotwell prosecuting for a debt due to them by the deceased, he purchased that debt and pursued the legal remedies for the recovery of it; first stripping John D. Jaques of all his remaining interest in the said lands, and then pursuing the residue of the estate in the

hands of the heirs at law, until finally, at the sheriff's sale when the lessor of the plaintiff became the purchaser, he obtained his money.

There is no pretence that the mortgage was not for a full consideration, or that the claim of the executors of Shotwell was not just. And if they were not objectionable, I cannot discover any fraud in the conduct of Moses Jaques, or that he was so circumstanced as to be prevented from pursuing the legal remedies for the recovery of his claims. The mortgage and the judgment against John D. Jaques, and sale of his interest, were matters of public record. Zophar Hatfield purchased with full knowledge of all the circumstances, and when he bid, could not have calculated that he was obtaining any interest in the mortgaged premises; unless upon the ground, now urged by his counsel, that the debts of the ancestor, John O. Jaques, remained a lien upon his lands, and that they could not be aliened by his heirs free from the incumbrance of those debts until they should be paid.

Upon this question there has been much doubt, and it is singular that it has not before this been presented for the determination of this court, in as much as it is liable to arise upon almost every death of a person seized of real estate.

By the common law, if the heir aliened before action brought, the creditor had no remedy. This, however, was corrected by the statute 3d and 4th *William and Mary Ch. 14*. In New-Jersey, says *Chief Justice Kinsey, Cox's reports* 133, "it has long been settled that lands are assets, in the hands of an executor or administrator for the payment of debts, and that upon an action brought against either, the real estates of the testator or intestate are chattels, may be taken in execution, and sold for the payment of debts, and this without making the heir a party to the suit." But although this may have been the law in 1792, the legislature thought proper to alter it in 1797, and by the act, *Rev. Laws, p. 291*, authorized an action to be commenced against the heirs, or against the heirs and devisees where there was a will; and providing that if they had aliened or made over the lands descended, or devised, before action brought, such heir or devisee should be liable to the value of the lands; and that execution should go against such heir or devisee accordingly: "But the lands, tenements, and hereditaments which were *bona*

Feb. 1829.

Den
v.
Jaques.

Feb. 1829. *fide* aliened before the action brought, shall not be liable to such execution." And if not liable to such execution, in what manner should they be made liable? It is under such execution that the plaintiff in this case claims; and the statute expressly says, that if the lands were *bona fide* aliened before suit brought, they shall not be liable to it. The only question then is, were they *bona fide* aliened? As I have said before, no fraud appears, and it is not to be presumed.

Den
v.
Van Houten.

The plaintiff in this case can derive no benefit from the act of 1799, making lands liable to be sold for the payment of debts; *Rev. laws*, p. 430. He does not claim the benefit of any proceeding by the executor or administrator to sell the lands to pay debts after the personal assets proved deficient. There has been no application to the Orphans' Court, or order for sale. And if there had been, it has been decided by the chancellor in the case of *Parret v. Van Winkle* and *Van Riper*, that under that statute the lands are bound only from the time of obtaining the order for sale.

The legislature of New-Jersey have lately passed a law upon this subject. By the act of December 12th 1825, they have not merely limited the continuance of the lien upon lands for the debts of the ancestor, but they have expressly created that lien for the term of one year; thus giving a legislative exposition of the previous statutes. Upon the whole, I am of opinion that the plaintiff should not recover the mortgaged premises.

Let there be judgment for the defendant.

DEN *ex dem.* GEORGE LORRILLARD against ADRIAN VAN HOUTEN.

If the subscribing witness to an instrument reside out of the reach of the process of the court, his hand-writing may be proved.

In an action of ejectment brought by the assignee of a mortgagee against a mortgagor, upon a mortgage given to corporation, it is not necessary to produce the charter of incorporation. The admission by the defendant himself in the deed of mortgage, is sufficient proof when uncontradicted, of the existence of the corporation.

THIS ejectment was brought to the term of May 1826, upon a demise by G. Lorrillard, the 30th August, 1826, of a cotton

mill and two acres of land, in the township of Acquackanonk and county of Essex. The defendant pleaded not guilty.

Feb. 1929.

Dea

r.

Van Houten.

The plaintiff produced a bond, together with a mortgage, purporting to have been given by the defendant to the Paterson Bank by its corporate name, and P. Dickerson subscribing witness. The mortgage purported to have been assigned afterwards to G. Lorrillard by the Paterson Bank, under the corporate seal; and William Slosson to be the subscribing witness thereto. P. Dickerson, being sworn on the part of the plaintiff, testified, that the bond and mortgage were given in his presence, and that he subscribed his name to each as a witness. He further testified that William Slosson, the subscribing witness to the assignment, resided in the state of New-York, and that the signature of his name as subscribing witness to the assignment, was the hand-writing of the said William Slosson. He further testified that the seal affixed to the said assignment, was the common seal of the Paterson Bank.

John W. Berry, being sworn on the part of the plaintiff, testified that the boundaries expressed in the mortgage comprehended the premises in question, and that the defendant had been in possession and carried on the mill from about September 1827 until the summer of 1829; that the defendant borrowed a bale of cotton from him to spin in the mill, during the summer.

Jeremiah Mitchell, being also sworn for the plaintiff, testified that the mortgage comprehended the premises in question, and that the defendant carried on the mill; and on cross examination he said that the defendant's son was agent for him, and that he, the witness, always understood that the defendant held possession till this summer.

The plaintiff's counsel then offered to read in evidence the bond, mortgage, and assignment, but the defendant's counsel objected to reading in evidence the deed of assignment, because it had not been proved by the instrumental witness, whose evidence it was argued could not be dispensed with, for if personal attendance could not be procured, his evidence might have been taken by commission. It was also mentioned that the corporate charter ought to have been produced. The court decided, that proof of the hand-writing of an instrumental witness was legal

Feb. 1829.

Don
v.
Van Houten.

and competent evidence of the execution of a deed when the witness resided in another country or state, beyond the reach of legal process ; that the defendant could not be allowed to deny the existence of the corporation which he had admitted in the bond and mortgage under his hand and seal. Whereupon the bond, mortgage, and assignment, were read in evidence, and the jury found a verdict for the plaintiff.

Upon a motion for a new trial—

Vanarsdale, for defendant, shewed, Reason 1. The instrumental witness to the assignment read in evidence was not examined. 2 *Starkie, Ev.* 338, shews the English rule of law, and in a note containing the American cases, mentions those states, in which the examination of the instrumental witness will not be dispensed with, if it can be obtained by commission.

Reason 2. No legal evidence given, that the Paterson bank are a corporation.

It belongs to government to create corporations. Individuals cannot give a name to several persons whereby they may sue; a suit in the name of a mercantile firm cannot be sustained ; so decided in our reports.

In a suit by a corporation, and the general issue pleaded ; they must on the trial prove themselves a corporation. 8 *John. R.* 378. 14 *ib.* 245. 19 *ib.* 300. 2 *Cowen.* 770.

And it is insisted that a party deriving title through a corporation must, on the trial, give the same evidence when the general issue is pleaded.

P. Dickerson. In answer to the first reason assigned in this case, the plaintiff insists that the principle is now well settled in New-Jersey, that if the subscribing witness to a deed reside without the jurisdiction of the court, in another state, it is competent for the party, (after proving the fact of such absence of the witness) to prove his hand writing, which is sufficient to admit the deed in evidence to the jury. 12 *Mod.* 607. 2 *East* 250. 4 *Johnson's Rep.* 461. 1 *Johnson's cases* 230. 6 *Sergeant and Rawle* 311. 4 *Halsted* 322.

As to the 2d reason, the plaintiff insists in the first place that it was not urged upon the trial at the Circuit, and therefore cannot be taken advantage of upon this motion. 6 *Sergeant and Rawle* 14.

But the reason is without foundation in law, even if it had been urged upon the trial, for the defendant had admitted the existence of the corporation under his hand and seal, and ought not to be permitted to deny the existence of that corporation, and more particularly as against a *bona fide* assignee. 14 *Johnson's Rep.* 238.

Feb. 1839.

Den
v.
Van Houten.

EWING, C. J. The first reason assigned for a new trial is, that the instrumental witness of the deed of assignment of the mortgage should have been produced and examined, or his evidence taken by commission; and that, though he was proved to reside out of the state, secondary evidence was inadmissible. In *Van-doren v. Vandoren*, 2 *Penn.* 1022, this court said, the rule which now obtains is, that if the subscribing witness resides out of the reach of the process of the court, his hand-writing may be proved. The rule in England as laid down by *Starkie*, 2 *volume* 338, is, that secondary evidence may be given if the witness is abroad and beyond the process of the court, whether he be domiciled there or not, as in Ireland. The same rule is adopted in the courts of several of the states of the union, although in others a different rule has prevailed.

The second reason for new trial is, that it was not proved on the trial that the President, Directors and Company of the Paterson Bank were a corporate body.* A number of cases

* NOTE BY THE REPORTER.—Notwithstanding the cases cited by the defendant's counsel, from the New-York reports, the later, and, I think, better opinion is, that upon the general issue it is not necessary to prove the corporate capacity of the plaintiffs. In the case of *Conard v. The Atlantic Insurance Company*, 1 *Peters' Rep.* 450, *Justice Story* says, "the first exception is, that the corporate capacity of the plaintiffs was not regularly proved, before the introduction of the *respondentia* bond. It is to be considered that this was a trial upon the merits; and by pleading to the merits the defendant necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do was a barrier of this objection." See also the case of *Den ex dem. State of New-Jersey v. Holmes and Dunham*, 2 *Penn. Rep.* 1050, under what circumstances a corporation may be presumed.

M M

Feb. 1820.

Schenck
v.
Schenck.

were cited to prove, that in an action by a corporation, on a plea of the general issue, proof must be made of the existence of the corporation. There may be strong reasons for requiring a corporation bringing a suit to shew it has legal existence and therefore a capacity to come into court and maintain such suit. The present action, however, is not by a corporation but by an ordinary person on a mortgage assigned to him by the corporation. In such case the admission by the defendant himself in the deed of mortgage under his hand and seal is, as against him, sufficient proof, when uncontradicted, of the existence of the corporation. *Henriques v. The Dutch West India Company*, 2 Lord Raym. 1535; *Dutchess Cotton Manufacturing Company v. Davis*, 14 John. 245. In the latter case, Chief Justice Thompson said: The defendant having "undertaken to enter into a contract with the plaintiffs in their corporate name, he thereby admits them to be duly constituted a body politic and corporate under such name." In the *Mayor, &c. of Carlisle v. Blamire*, 8 East 487, the issue was, whether the corporation was known by a certain name at the time when the ancestor, under whom the defendant claimed, granted a water course to it, and the deed of that ancestor describing the corporation by that name, was held to be sufficient evidence against the defendant that the corporation was then known by that name, especially as it was not encountered by any other evidence.

Judgment for the plaintiff.

PETER S. SCHENCK against THE EXECUTORS OF JOHN SCHENCK,
DECEASED.

If the summons issuing out of this court, calls upon the defendants to answer the plaintiff in a plea of trespass, and also to a bill to be exhibited against the defendants to the damage of the plaintiff \$3000, and the declaration is in assumpsit, the defendant may craveoyer of the writ and plead in abatement, the variance between the summons and the declaration, and such plea will be good.

W. HALSTED, for the plaintiff.

Vroom, for the defendants.

The Chief Justice delivered the opinion of the court

Feb 1829.

Schenck
v.
Schenck.

This case comes before us on a demurrer to a plea in abatement, in which the defendant, after oyer of the writ of summons, whereby the action was commenced, alleges a variance between the writ and the declaration in this, "that in and by the said writ the said defendants are summoned to answer unto the plaintiff in a plea of trespass, and in the said declaration founded on the said writ, the said plaintiff complains of the defendants of a plea of trespass on the case upon promises."

The summons requires the defendants "to answer unto Peter S. Schenck of a plea of trespass; and also to a bill of the said Peter then and there to be exhibited against the said David Manners, Garret Schenck, and Peter Voorhees, executors as aforesaid, to his damage, eight thousand dollars." The declaration is in assumpsit, containing the common counts for work and labour done, money lent and advanced, money paid, laid out and expended, goods, wares and merchandise sold and delivered, and a count on a subscription to pay a sum of money to assist the plaintiff in erecting a grist mill.

Between the action of the declaration and the action of the writ, there is clearly the variance averred by the defendants in their plea. The latter is trespass. They are required to answer "in a plea of trespass," and although the words, "and also to a bill," &c. are added, yet no other form of action is expressed, and hence the writ must necessarily be either a writ in trespass or without form of action. It is probable the person who drew the writ, intended to pursue the form of the court of King's Bench, and the ancient form of this court, inserting the clause of trespass and the *ac etiam*, in the latter of which he may have intended to express some other form of action; but he has not done so, and the writ stands therefore an informal writ in trespass. In the case of *The Bank of New-Brunswick v. Arrowsmith*, 4 Halst. 284, we held that the declaration must conform to the writ. Such conformity is required, as well by the rules of the common law, as by our statute, which forbids the practice of declaring, by the by; a practice introduced into the court of King's Bench, in consequence of their peculiar mode of acquiring, by fiction, jurisdiction of certain civil actions. In the same case, we also held that a defendant may avail himself of a variance between the writ and declaration, by oyer and plea in abatement. *Chirac v. Reinicker*.

Feb. 1829.

Schenck

Schenck.

11 *Wheat.* 302, variance between the writ and declaration may be pleaded in abatement.

Let judgment on the plea in abatement be entered for the defendants.

GARRET SCHENCK, PETER VOORHEES, AND DAVID MANNERS,
EXECUTORS OF JOHN SCHENCK, DECEASED, *against* PETER
SCHENCK.

A plea in abatement to a declaration in *assumpsit*, that another action had been previously commenced by the defendant against the plaintiff, in which the matters mentioned in the declaration might be set off, is good.

What the parties in pleading have agreed, and admitted, must stand in that action, and as between them for truth.

Vroom, for plaintiffs.

Wm. Halsted, for defendant.

The Chief Justice delivered the opinion of the court.

The declaration in this case is in *assumpsit*, for use and occupation on promises to the deceased, on an account stated with the deceased, and for use and occupation, and for interest, upon promises to the executors.

The defendant has pleaded in abatement that previous to the suing out of the writ against him in this action, he sued out of this court a writ of summons in case against the plaintiffs, executors as aforesaid, for eight thousand dollars damages, which was duly served on them, and the action thereon is still depending before this court; that he filed a declaration in the said action against them; and that the cause of action for which he is now sued in the present action arose previously to the suing out of the said summons by him against them, and may be set off and settled in the said action so depending against them. To this plea there is a general demurrer and joinder.

The matters stated in this plea being admitted by the demurrer to be true, the question arises whether an action having been previously commenced, in which the matters claimed in the

Feb. 1829.

Schenck
v.
Schenck.

present suit may be made the subject of set off, the defendants in that action, now the plaintiffs, could lawfully institute this suit.

The solution of this question is found in our statute, "concerning obligations, and to enable mutual dealers to discount." *Rev. Laws* 305. In the eleventh section it is enacted, that if any two or more dealing together, or having dealt together, be indebted to each other upon bonds, bills, bargains, contracts, promises, accounts, or the like, and one of them or his executors or administrators commence an action against the other or his executors or administrators, if the defendant cannot gainsay the deed, bargain, contract, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or any part of the sum demanded, giving notice in writing with the plea of what he will insist upon at the trial for his discharge, and to give any bond &c. so given notice of in evidence; or else be precluded from bringing any action for that which he might or ought to have pleaded and given in evidence. By the provisions of this section, the defendant is compelled, when an action is brought against him in which a set off may be made, to offer his demands by way of set off; and failing to do so, is prohibited from making them the subject of an action. An action being instituted against him, he is required to claim a set off in it, and is precluded from bringing an action for such demands as he might set off. The proper course of proceeding is fixed by the commencement of the first action. The defendant is required to plead payment, to give notice, and, on the trial, to produce evidence of his demands. If he omit to do so, he is prohibited from bringing a subsequent action; and it equally and necessarily follows that pending the first, he is precluded from instituting another. The obvious spirit and policy of the statute was not only to encourage, but to enforce the adjustment of such demands in one action. If it be objected that a person who justly anticipates an action against him, may, to create delay, or to procure some undue advantage, himself become plaintiff, the answer is, that a consequence of this kind, very little however to be feared, is the error of the law not of the interpretation; and if the situation of plaintiff brings with it any benefits, the way was equally open to the other party to have become so; and the wisdom of the law has long said, *vigilantibus non dormientibus jura subveniunt*. The prohibitory

Feb. 1820.

Schenck

v.
Schenck.

clause of our statute is not contained in the English statutes of set off. Under them it is optional with the defendant whether he will waive, or avail himself of the privilege. He may, if he please, omit to claim it, and for his demands institute another action. *Montagu on set off*, 37. The question now before us could not, therefore, have arisen there; and accordingly, we do not find in the books of practice, the precedent of a plea of this nature, nor an adjudged case on the point, in the reports of *Westminster Hall*. The same rule prevails in most of the states of the Union. The statute of New-York, which authorizes a set off in the practice of the higher courts, has been held to be not compulsory, and that a defendant may waive the set off and resort to an action. *Rev. Laws, Edit. of 1807, Sess. 24, ch. 90. Carpenter v. Butterfield*, 3 *John. ca.* 146. In the statute of that state for the recovery of debts under twenty-five dollars, in the justices' courts, *Rev. Laws, ch. 165*, the prohibitory clause is inserted: the defendant is allowed to set off any account or demand against the plaintiff, and if he neglect or refuse, he is precluded from having any action for the same. Under this statute, in the case of *Douglass v. Hoag*, on *certiorari*, 1 *John.* 283, a plea in an action before a justice of the peace, that the defendant had previously commenced an action against the plaintiff before another justice of the peace, in which the plaintiff ought to have set off his demand, was sustained. The obligation imposed on the defendant by the statute to set off his account or demand, is the principle on which this decision was placed by the court. "To permit," says *Thompson, J.*, very appropriately, "a defendant against whom a suit is brought, immediately to commence a cross action, and endeavour to have his cause brought to trial first, and to compel the plaintiff in the first action to set off his demand in the second, would not only be throwing on him the costs of his own suit, which he had a legal right to commence, but would be opening a door to that kind of strife and vexatious practice, which ought not to be countenanced." In the case of *Townsend v. Chase*, 1 *Cowen*, 116, the same court held a similar plea to be a good bar.

It is suggested that the action brought by the defendant and mentioned in the plea before us, is, in truth, that which was commenced by summons in trespass, in which we have just now delivered an opinion, and that being in trespass, and the

Feb. 1829.

Den
v.
Emerson.

party therefore irregularly declaring in assumpsit, there was really no such action previously commenced, as is averred in the plea. But it is clear that, in examining the present case, we cannot look beyond the pleadings of the parties. The defendant avers the pendency of a former action *in case*, in which the matters of the present suit might be set off. The plaintiffs' by the demurrer admit these allegations to be true. What the parties in pleading have agreed and admitted, must stand as between them and in this action for truth. The *State v. Crowell*, 4 Halst. 411. If the plaintiffs intended to controvert the existence of such previous action as is set up in the plea, they should have filed a replication instead of a demurrer.

Let there be judgment on the plea in abatement for the defendant, with leave to the plaintiffs to withdraw their demurrer and reply.

JOHN DEN *ex dem.* WILLIAM BROWER against JOHN EMERSON.

IN EJECTMENT.

The first two reasons relied upon in this case for a new trial, viz: that the verdict was against evidence, and that the charge of the court was erroneous, were not sustained in point of fact.

Where the jury is called upon to weigh the contradictory testimony of two surveyors, it is not an objection to the charge of the judge that he told the jury "that in estimating and comparing the conflicting opinions of the surveyors, they should not overlook the fact that the plaintiff's surveyor was the same man by whom the lots were originally surveyed and laid out."

THIS was an action of ejectment, tried at the Essex Circuit, before his Honour the *Chief Justice*, and a verdict found for the plaintiff. A rule for a new trial was obtained, and argued by

Frelinghuysen, for the plaintiff.

Ph. Dickerson, for the defendant.

The Chief Justice delivered the opinion of the court.

The first reason assigned for setting aside the verdict is, that the jury erred in point of fact, or, in other words, that the verdict is against the evidence.

Feb. 1829.

Den
v.
Emerson.

The parties in the cause are the owners of adjoining lots in the town of Paterson. Both lots, with others in the vicinity, formerly belonged to the same person, Abraham Van Houten. In 1813, he divided a large lot into divers smaller lots; one of them, called No. 1, he conveyed by deed, to Brant and James Van Blarcom. Two others, No. 2 and No. 3, he granted by one deed, of the same date with the former, to the person who conveyed them to William Jacobs, under whom the defendant holds possession. Another lot, No. 4, he conveyed to the lessor of the plaintiff, describing it as he had done the others, by course and distance, and bounding it on the lot No. 3. The defendant, who sometime since erected an house, placed it, as the lessor of the plaintiff alleges, although warned at the time against doing so, upon his lot ten inches in the rear, and fifteen inches in the front. According to the deeds, the easterly line of the defendant's lot is the western boundary of the other. One line is common to both, and the true location of that line is the matter in controversy. The defendant says these lots all bound on Van Houten street, and their lines lie at right angles with it; and the deeds shew this to be true. He says his surveyor ascertained the course of Van Houten street to be N. 83 deg. 30 min. W., and running from the corner of the defendant's house on the street, a course S. 6 deg. 30 min. W., at right angles with the street, he struck the rear line of the lots, or the society's line, as it is called, about four inches to the west of Brower's corner. Hence running from that corner, reversing the course, N. 6 deg. 30 min. E., which line would be four inches easterly of the other line, the house of the defendant would be found entirely to the west of the line, and therefore not within the plaintiff's boundaries. The jury, however, did not adopt this line; and herein, says the defendant, the jury erred. This conclusion, as is manifest, is founded entirely on the assumption that the true course of Van Houten street is N. 83 deg. 30 min. W.; and if this be not so, some other course than 6 deg. 30 min. will be necessary to form the right angle. But in what way did the surveyor ascertain N. 83 deg. 30 min. W. to be the course of Van Houten street? Not from the deeds; for they give it N. 83 deg. 20 min. W. Not from the Society's line, as stated in the deeds, for this also is given N. 83 deg. 20 min. W., and Van Houten street appears from the deeds

Feb. 1832.

Dea
v.
Emerson

to be parallel to it. Was it from an observation with his compass in the street? or by the fronts of the houses? He did not inform the jury. And as so much depends on the accuracy of this first step, in order that its correctness might be tested and shewn to be a safe reliance, the method of its ascertainment ought to have been distinctly stated. Neither the argument nor the evidence then can be entitled to much weight, unless the course used by the surveyor is shewn conclusively to be the course of Van Houten street. It was insisted by the defendant's counsel, that this street is a fixed landmark, and entitled to prevail over, or rather to regulate, other lines both in course and distance. But the question recurs, what is Van Houten street? What is its course? If that course is entitled to the respect of a fixed boundary, it ought to possess more certainty than has yet been shewn to belong to it. For whether the course is to be ascertained by actual observation, or by the situation of the houses, which may or may not have been accurately placed; or from the various deeds which border on it, has not been settled. Inasmuch then as this evidence and argument assume a proposition which was in itself an unsolved problem, it cannot be said the jury erred in not yielding to it, if on the part or shew of the plaintiff there was satisfactory ground on which to rest their verdict. The evidence exhibits the following view, which has, it may be presumed, been adopted by the jury. The line in dispute, is the third line of the original deed under which the defendant claims and the first line of the plaintiff's deed; the course and distance are the same in both deeds; and they are in fact, as already remarked, one common line. The beginning corner of the plaintiff's deed, which is also the third corner of the defendant's deed, is undisputed. This corner then was taken by the plaintiff's surveyor as his starting point. He also ascertained that it was correct, by beginning at an house which stands at the junction of Prospect and Boudinot streets, which is the first corner of lot No. 1. of these lots, and running thence along Prospect street the given distance to the Society's line, and then along that line, the required distance of lots No. 1 and 2 and 3, whereby he came out within two or three inches of the acknowledged corner of lots 3 and 4. Starting from this corner, he ran a course N. 6 deg. 40 min. E. the course called for in all the deeds, and which is not by any evidence shewn to have been originally er-

Feb. 1829.

Den
v.
Emerson.

roneous ; and the line thus run, passed through the house of the defendant ten inches in the rear and fifteen inches in the front, and shewed, if it was correct, that the defendant had so much encroached on the lot of the plaintiff. Now this line was evidently correct, if the starting point was right, if the course run was true, and if the work of the surveyor was skilfully performed. But the starting point was undisputed ; the course assumed is that which is given in all the deeds, including those by which the lots were originally laid out and conveyed ; and of the accuracy of the artist no doubt is expressed. It may, however be asked, does the line as thus run form a right angle with Van Houten street ? It certainly does if 83 deg. 20 min. be the course of that street ; and that such is the true course is abundantly shewn, whatever may be the present range of the street, or situation of the adjoining houses, from the contents of the deeds ; which according to the evidence is the only true source whence the course may be deduced ; and which street it was said. by the defendant's counsel, on the argument, was formed in 1813, by the laying out of these lots and had not before existed.

Another part of the evidence received, it may be presumed, some attention from the jury. In January 1824, William Jacobs, the real defendant in the cause, became the owner of lots No. 2 and No. 3. In the month of May of the same year, he purchased and obtained a conveyance from Abraham Van Houten, of a gore or triangular piece of land lying eastwardly of the lot then owned by him, and between it and that of Brower. This gore, according to the description in the deed extends easterly along Van Houten street, sixteen inches from the north east corner of William Jacobs' lot. Upon this gore in part, the house occupied by the defendant is placed, for his surveyor testified that the line, as he claims it, just cleared the house. On the trial, the existence of this gore between the lots, and the title of Jacobs to it, were strenuously urged ; but on the argument of the motion for new trial, very properly abandoned, in as much as since lot No. 4 or Brower's lot bounds on lot No. 3 or Jacobs' lot, there can by no possibility be a gore between them. If, however, the east side of the house was placed, under the supposed strength of that deed, fifteen or sixteen inches easterly of the north east corner of lot No. 3, it will be seen at once that the easterly line of that lot as then considered, corresponds with the survey now made by the

Feb. 1829.

Dea
v.
Emerson.

plaintiff, for the plaintiff's surveyor says, his line struck the house ten inches in the rear and fifteen inches in the front ; and farther that the " house is a little skewing and is not set exactly square." If then the jury believed, from the evidence, that the plaintiff's line as now run coincided with the line taken and deemed to be the true line in 1824, prior to the occurrence of any controversy, they may with propriety have given some weight to the fact in settling any doubts which had been raised.

On the argument it was strongly pressed, that Brower had the distance called for by his deed, 30 feet on the street, exclusive of the part claimed by him from the defendant, or in the words of the witness, " measuring from the end of Emerson's house, to the middle post of Brower's fence, and the distance is thirty feet and six and a half inches ;" and measuring the whole length of the street from the turnpike up to Emerson's corner, and it is 455 feet and some inches ; according to which there is 30 feet and the fraction of an inch for Brower's lot, clear of the line as claimed on the part of the defendant. But it is obvious to the slightest reflection, that no dependance can be placed on this course of reasoning. For the necessary order of things is exactly reversed. The north east corner of lot No. 3, is not fixed by its distance from the northeast corner of Brower's lot No. 4, nor by its distance from the turnpike ; but on the other hand the northeast corner of lot No. 4, is fixed by its distance 30 feet from the north east corner of lot No. 3, which of consequence must be first ascertained, the line of lot No. 4, running as described in the deed, and as already mentioned, along the easterly line of lot No. 3, to its corner on Van Houten street. If instead of giving the distance, on the street, of Brower's lot, the surveyors had given the distance of the defendant's or Jacobs' lot, more elucidation might perhaps have been obtained ; for if in the defendant's front on Van Houten street, measuring from the north east corner of lot No. 1, there would be according to the plaintiff's claim sixty feet less fifteen inches, the defendant would not then have, what his deeds, entitled, according to the manner in which they are drawn, to be first satisfied, distinctly demand ; but if in the defendant's front are contained sixty feet and fifteen inches, then additional strength would be given to the plaintiff's claim. From the absence of any evidence on this point, the jury may have fairly drawn an inference, since it cannot well be supposed to have escaped the

Feb. 1820.

Den
v.
Emerson.

vigilance of the defendant's surveyor, whose long experience was a matter of testimony, to shew, if the truth would have sustained him, that the plaintiff's claim did not leave the defendant the extent of front to which his deeds entitled him, and entitled him, as already remarked, in preference to the claims of the plaintiff.

From a careful examination of the evidence, I can find no satisfactory proof that the jury have erred, or that their verdict is in any measure inconsistent with the evidence. There is a discrepancy in the observations of the two surveyors not noticed on the argument at the bar, which although it does not shew who is wrong, clearly proves that both cannot be right. The defendant's surveyor says a line run from the common corner of the parties on the rear in the Society's line N. 6 deg. 30 min. E. would clear Emerson's house. The plaintiff's surveyor says, a line run from that corner on a course N. 6 deg. 40 min. E. strikes Emerson's house ten inches in the rear and 15 inches in the front. But the latter line according to the course should lie not to the westward but to the eastward of the former.

The second reason urged for new trial is, that the charge to the jury was erroneous in the method stated to them whereby they might ascertain the position of the line in dispute. The part of the charge objected to is in these words. "There is, it appears to me, a plain simple and easy mode whereby to ascertain, locate and fix the line. Each lot according to the succession of numbers is made to depend on the next preceding lot. Lot No. 1 is bounded by three streets, and extends thirty-four feet three inches on the Society's line. No. 2 is bounded by lot No. 1; No. 3 by No. 2; and No. 4 by No. 3. Locate No. 1 and you have the western boundary of No. 2. Lay out No. 2 and No. 3 which are thrown together in the deeds from Van Houten to Parke, and from Ryerson to Jacobs, and whose description is precise, and you thus find the eastern line of No. 3, the line in dispute on this occasion; for by the terms of the deeds, the eastern line of No. 3, and the western line of No. 4, are the same. Hence a satisfactory mode of ascertaining the true position of this line is presented." The argument is that the direction to go to lot No. 1, was wrong, for that as lots were laid out in the whole extent from Prospect street to the turnpike, the jury might with equal propriety have been directed to begin at the latter and go back to the premises in dispute. There is, however,

Feb. 1829.

Den
v.
Emerson.

no solidity in this argument, nor support for this objection. It can only gain credit from overlooking the language and structure of the deeds. If there was no error to be corrected, then the result would be the same which ever mode was pursued; but if there was an error to be corrected, and the existence of this suit and of the deed for the gore made in 1824, may serve for proof that an error in some way, in opinion at least if not in fact existed, then the mode to be pursued was evidently to locate the lots in the succession which the description in the deeds pointed out. As the eastern line of lot No. 1, was made to form the western line of lot No. 2, the former of these should be first settled—And so, of the rest. To set out at the turnpike and run the other way, would require the eastern line of lot No. 3, to depend on the western line of lot No. 4, the reverse of what the order of the deeds prescribes. Suppose the fact to be that there is not space enough to satisfy all the deeds. Lot No. 1, must be first satisfied in full tale. So of the others in succession of numbers. It was properly remarked by the defendant's counsel, on the argument, that the rule to find out the true line was the actual location of the lots not the numbering of them: But then it will be seen by the deeds that the location is made to depend in a measure on the numbers. If a location is made commencing at the turnpike and running westerly, the deficiency, if any exists, must be thrown upon lot No. 1, and so, the westerly line of lot No. 2, being found will serve to fix the easterly boundary of No. 1; whereas, the plain and unequivocal language of the deeds, requires the converse of this proposition.

Another objection to the charge is, that the jury were told that "in estimating and comparing the conflicting opinions of the surveyors, they should not overlook," among other things which were stated to them, "the fact that Vanzaun, the plaintiff's surveyor, was the same man by whom the lots were originally surveyed and laid out." This remark, it is objected, was as much as to tell the jury they ought to give some weight to his testimony on that account. And is it not true that they should have done so? How much weight was not hinted, because of that the jury were to consider. It was the duty of the court to present to the jury such topics as were worthy of their attention. If the fact was unworthy of attention, it was wrong to recommend them

Feb. 1829.

Vandoren
v.
Vandoren.

to consider it. But if, *ceteris paribus*, the surveyors were of equal merit and standing, and I am not aware of any difference, except in this respect, exhibited by the evidence, he who had himself originally surveyed and laid out these lots was, on that account, entitled to some what more of confidence than a stranger. If this be not so, there must be some peculiarity in the business of surveying, which renders practice and experience of less value than in any other department of art or science.

Judgment on the postea.

WILLIAM A. VANDOREN *against* AARON VANDOREN AND AARON VANDOREN, JUN.

The propriety of an appeal should appear on the face of the appeal papers sent to the court of Common Pleas, and if it does not, that court may dismiss the appeal.

If it appears by the transcript, that the justice took time to advise, and it does not appear that the defendant attended at the time the judgment was rendered, the court of Common Pleas may dismiss the appeal.

THIS was an application for a *mandamus*, to be directed to the Court of Common Pleas of Somerset, to command them to restore an appeal; and came before this court upon the following state of the case, agreed upon by parties, viz. :

This cause came on for hearing, before the judges of the Court of Common Pleas, in and for the county of Somerset. Whereupon the attorney for the appellees read the transcript of the justice, and by him sent up with the papers, from which it appeared that the parties attended before the justice on the return day of the summons. The plaintiff filed his copy of account, and the defendant filed his plea; and the cause was adjourned at the request of the plaintiff to the fifth day of June 1826. On the fifth day of June, the adjourned day, both parties appeared ready for trial. The defendant moved for a nonsuit, which was overruled. The plaintiff then examined three witnesses, and the defendant examined one witness. The transcript then sets out the following facts. "After hearing the evidence and proofs of the parties, and examined and compared their books

of account, I took until Monday the 26th inst. four o'clock P. M. at my house in the township of Bedminster. June 26th, 1826, gave judgment against defendant for forty dollars and fifty-five cents of debt, with three dollars and eleven cents costs of suit."

Feb. 1829.

Vandoren
v.
Vandoren.

The attorney of the appellee moved to dismiss the appeal on the ground that this was a judgment given in the absence of the defendant.

And the court dismissed the appeal.

Green, for appellant.

Vroom, for appellee.

The Chief Justice delivered the opinion of the court.

We are of opinion the appeal in this case was rightly dismissed by the Court of Common Pleas. The entry on the justice's docket, of the judgment appealed from, is in these words: After hearing, &c. "I took until Monday the 26th inst. four o'clock P. M. at my house in the township of Bedminster. June 26, 1826, gave judgment against defendant for forty dollars and fifty-five cents of debt with three dollars and eleven cents costs of suit." A judgment rendered after time, taken by the justice to advise, if the defendant does not attend, has been repeatedly held to be a judgment, in the absence of the defendant within the meaning of the statute. *Clark v. Read*, 2 *South*. 486. *Pietson v. Pierson*, 2 *Halst.* 125. *Sample v. Amboy Trustees*, 3 *Halst.* 60. It is a clear and sound rule, that the propriety of an appeal should appear on the face of the papers sent to the Court of Common Pleas, or in other words, it should appear that the case is one in which an appeal will lie. But here the entry on the docket does not shew that the defendant was present, and therefore entitled to appeal; nor is his attendance to be presumed. The Court of Common Pleas could not therefore legally sustain the appeal. If in truth, the defendant was present when the judgment was rendered, instead of waiting in the Court of Common Pleas until the appeal was called for hearing and a motion was made to dismiss it, he should on the return of the transcript and papers, have obtained a rule from that court calling on the justice to certify whether he was present at the rendition of the judgment.

Motion for *mandamus* over ruled.

Feb. 1829.

DANIEL LAKE AND REUBEN VANKIRK *against* BENJAMIN MERRILL.10a 988
57 226Sutphin
v.
Tunison.

CERTIORARI.

If judgment is rendered for a sum exceeding the amount mentioned in the state of demand, the judgment will be reversed.

BY THE COURT. The sum demanded by the plaintiff in the state of demand filed before the justice is \$37.92, and judgment was rendered on the appeal in his favor for a larger sum \$40.04 debt besides costs. On this ground the judgment was reversed in *Hawk v. Anderson*, 4 Halst. 319.

Judgment reversed.

STEPHEN SUTPHIN *against* HARDENBERGH AND TUNISON.

If there is an interlineation in a material part of an appeal bond, which is not noted at the foot thereof, the bond will be defective, and the appeal may be dismissed.

VROOM moved for a peremptory *mandamus*, to be directed to the court of Common Pleas of the county of Somerset, to compel them to restore an appeal which had been dismissed on account of an alleged insufficiency of the appeal bond; and he read a state of the case agreed upon by the attorneys of the parties, by which it appeared that several objections to the bond were taken in the court of Common Pleas. The only one necessary to be noticed is: that there was an interlineation in the bond of the words "*and ten dollars*," which interlineation was not, in any manner, stated to have been made previous to its execution, or noted on the bond. He contended that the court of Common Pleas erred in dismissing the appeal on that ground; that the interlineation did not vitiate the bond; and that in the absence of all testimony, the presumption was, that the interlineation was made before the execution of the bond.

J. S. Green, contra. Unless there be a regular appeal bond, the Court below has no jurisdiction. The alteration in this bond

is in a material part of it. Because, if that part of the bond is struck out, the Court of Common Pleas have no jurisdiction. The presumption of law is, that the interlineation is made after the execution unless the contrary appears.

Feb. 1829.

Davisson
v
Gardner.

CH. JUSTICE. The Court of Common Pleas did right in dismissing the appeal. The party appellee is entitled to have a bond perfect upon the face of it. If the presumption is, that the alteration was made before the execution, yet it is only a presumption, and may be overcome by proof to the contrary. Whether the alteration was made before or after the execution, must be put to a jury to determine, and the bond may be found to be invalid. The appellee is not compelled to take a bond which may turn out to be bad. He is entitled to a good bond.

Motion refused.

ARCHIBALD DAVISSON against SAMUEL GARDNER.

In order to prove that the cause of action of a former suit in trespass, was the same as that for which a subsequent suit of trespass on the case was brought, it is necessary to produce not only the transcript but the state of demand also. And until this is done parol evidence of the identity of the subject matter of both suits cannot be received.

THIS was a *certiorari* to the Court of Common Pleas of the county of Warren, to bring up the judgment and proceedings on an appeal from a justice of the peace. The papers returned with the *certiorari*, disclosed the following facts: On the 25th of September 1826, Samuel Gardner, the defendant in *certiorari*, brought an action against Archibald Davisson, for trover and conversion, before George R. King, esq. and filed his state of demand in the usual form to recover damages for thirteen hundred sheaves of rye, and one hundred sheaves of wheat, alleged to have been converted by the defendant to his own use. On the trial before the justice, after the plaintiff (Gardner) had offered his witnesses, the attorney of Davisson, moved to have the cause dismissed, on account of a former action of trespass hav-

F. b. 1829.

Davisson
v.
Gardner.

ing been instituted against him by Gardner; in which, as he alleged, was included the same matter in controversy, and which action had been dismissed by the justice, in consequence of Davisson's pleading title to the land on which the trespass was alleged to have been committed, and filing bond in pursuance of the statute. A transcript of the docket was produced to prove the facts, unaccompanied by a copy of the state of demand. The justice over ruled the motion, and gave judgment in favor of Gardner (the plaintiff below) for the sum of fifty-four dollars and eighty-seven and a half cents damages, with costs. From this judgment, Davisson the defendant below, appealed to the Court of Common Pleas of the county of Warren; and on the trial of the appeal, at the term of August 1827, Henry Smith, a witness sworn and examined on behalf of the appellee said, that he was present when the appellee demanded the grain in dispute of the appellant, which the appellant refused to deliver to the appellee. And being crossed examined on the part of the appellant said, that this demand was made last harvest, a year. That the appellant in the conversation said, that the grain was his; that he had purchased the barn. And witness being asked by the appellant if the appellee had not informed him, that he had brought an action of trespass for this grain heretofore, the said question was objected to by the appellee, which objection was sustained by the court, and the question overruled. Before the appellee gave any evidence on this appeal, the appellant offered the above mentioned transcript from the docket of George R. King, esq. and prayed the Court of Common Pleas to dismiss the suit, but the court over ruled the motion; and after hearing the argument of counsel reversed the judgment of the justice, and rendered a new judgment in favour of Gardner the appellee (and plaintiff below) for the sum of \$28.25. To reverse this judgment, Davisson the appellant and defendant below brought this *certiorari*.

Scudder on his behalf, relied upon the following reasons for the reversal of the judgment of the Court of Common Pleas.

1. Because the Court of Common Pleas over ruled the question proposed to Henry Smith.
2. Because the Court of Common Pleas over ruled the motion to dismiss the suit.

Vroom for the defendant, in *certiorari*, contended

Feb. 1829.

Davison
v
Gardner.

1. That the Court of Common Pleas did right in over ruling the motion to dismiss the suit, because it did not appear that the action mentioned in it (although between the same parties) was for the same cause ; there was no state of demand offered with the transcript, to shew what was the real subject matter of the dispute, and the transcript offered in evidence purported to be the record of proceedings in an action of *trespass*, whereas, the present action was an action of *trespass on the case*.

2. That the Court of Common Pleas did right, in rejecting the testimony offered to prove that Gardner had admitted that the action of trespass which had been previously brought, was for taking this same grain for which this action of trespass on the case had been instituted. It was an attempt to supply by parol testimony what ought to appear by record.

3. That even if the transcript of the former action of trespass and the parol evidence offered, had been admitted, it would have been immaterial. For a defendant's pleading title and filing bond, in pursuance of the statute did not prevent the plaintiff from bringing another action, for the same cause, before another justice, or in the Court of Common Pleas. By the bond which the defendant enters into on such an occasion, he merely obliges himself to appear to an action to be commenced at the *next* Supreme Court. And if the plaintiff does not commence his action at the *next* court he loses his security, but is not thereby barred from bringing another action.

By THE COURT. The question proposed by the appellant to Henry Smith, the witness, was properly over ruled by the Court of Common Pleas. If the purpose of the appellant was to prove the cause of action of the suit in trespass he should have produced, with the transcript, a copy of the state of demand, which as appeared by the transcript had been filed. If the purpose was to prove the identity of the grain in both actions, he should have first proved by legal evidence that the first action was brought for taking away grain.

Inasmuch, then, as it was not legally shewn that both actions were for the same cause, the motion to dismiss was rightly denied by the Court of Common Pleas. The effect of the proceedings in the first action to bar the second action, if for the same cause, does not require to be considered or decided.

Judgment affirmed.

Feb 1829.

State

Townships of
Chester and
Evesham.

THE STATE *against* THE TOWNSHIP COMMITTEES OF THE TOWNSHIPS OF CHESTER AND EVESHAM, IN THE COUNTY OF BURLINGTON.

MANDAMUS.

One and the same writ of *mandamus* cannot be directed to the township committees of two several townships, to compel them to proceed to do their duty in a matter of road.

THIS was a writ of *mandamus* directed to the township committees of the townships of Chester and Evesham in the county of Burlington, reciting, "That whereas J. H. and others, (naming them) surveyors of the highways of the county of Burlington, on the second day of March A. D. 1825, laid out a certain road of three rods wide in the said townships of Chester and Evesham; nevertheless that the said township committees had refused and neglected to assign and appoint, in writing, to some one or more of the overseers of the highways in the said townships the road aforesaid thus laid out, for opening, clearing out, working, amendment and repair agreeably to the provision of the statute in such case made and provided, therefore commanding and strictly enjoining the said township committees, immediately upon the receipt of the said writ to assign and appoint, in writing, to some one or more of the overseers of the highways of the said townships, their several limits and divisions of the said road for opening, clearing out, making, amendment and repair, or shew cause to the contrary."

Sloan, for the defendants, moved to quash this writ and contended, that the same writ could not be directed to the township committees of two several townships. But that there should be a separate writ to each township.

Hamilton, contra.

BY THE COURT. The duties and liabilities of the townships and their officers in the opening, making and repair of roads are entirely distinct. Each township acts for itself and not in connection with any other. *Rev. Laws* 621. *Chitty* says, where an highway running through several parishes is out of repair, a joint indictment is not sustainable. 3 *Chit. Cr. Law*, 567. The committees of both townships ought not, in the present case, to have been included in the same writ.

Let the *mandamus* be quashed.

ROBERT QUIGLEY *against* JOEL MIDDLETON.

Feb 1820.

State
v.
Webster.

A writ of restitution issued after, although tested before the death of the defendant or person against whom it issues, will be quashed. And the application to quash may be made on behalf of a party interested.

WALL moved to set aside the writ of restitution issued in this case upon the reversal by this court of a judgment of forcible entry and detainer, which had been brought here by *certiorari*. He read affidavits to prove that Joel Middleton, the person against whom the writ issued, died on the 10th of September 1828, and to prove that the sheriff did not receive the writ of restitution until the 8th of October last; the writ was tested on the first Tuesday of September, which was the 2d day of September. He also read a deed from Joel Middleton to Benjamin South, dated in August 1828, for the premises mentioned in the writ of restitution; and he stated that he made this motion in behalf of the purchaser B. South, and of the executors of Joel Middleton.

Hamilton and *Scott* resisted the motion, and contended:

1. That the writ was good because it was tested before the death of Middleton, although it issued after.
2. That if the writ of restitution was irregular, it ought to be set aside only upon the application of a person who had a right to make such application. That the only persons who had a right to make the application, were the heirs of Joel Middleton. That the executors had no right in the land, and that the purchaser having purchased *pendente lite* had no right to make the application.

CH. JUSTICE delivered the opinion of the court, that the writ of restitution must be quashed, because it issued after the death of Middleton.

Writ quashed.

THE STATE *against* JAMES WEBSTER.

An indictment for selling liquor by small measure, which provides that the defendant, did not obtain a license according to the act concerning Inns and Taverns, is insufficient and will be quashed.

This indictment had been quashed by the Court of Quarter Sessions of the county of Somerset, for insufficiency, and was



Feb. 1829.

State
Webster.

thereupon removed by the prosecutor for the state, into this Court by *certiorari*. The indictment was in the following words :

"Somerset County, ss. The grand inquest for the state of New-Jersey, and for the body of the county of Somerset upon their oath present : That James Webster late of the township of Bridgwater, in the said county of Somerset, on the twenty-fifth day of December, in the year of our Lord one thousand eight hundred and twenty-seven, at the township of Bridgwater aforesaid in said county, and within the jurisdiction of this court, with force and arms, &c. did sell, and knowingly cause and permit to be sold for his own account and benefit, to one Abraham Van Duyn, one half pint of ardent spirits, commonly called whiskey, the same being of less measure than one quart ; he the said James Webster, not having first obtained a license for that purpose, from the Court of General Quarter Sessions of the Peace of said county of Somerset, in the manner directed by the act concerning Inns and Taverns, nor from the corporate authority of any city or borough, in which he resided, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government, and dignity of the same."

Hartwell, for the state, contended that the indictment was sufficient, and cited 4 *Halst. Rep.* 374. 2 *Hawk. P. C.* 357. 1 *Chit. Crim. Law* 157. 1 *Halst. Rep.* 173. *Arch. Cr. Law* 28, 29.

Vroom and *J. S. Green*, contra.

CH. JUSTICE. We are all of opinion that this indictment was rightly quashed by the Court of Quarter Sessions. The manner in which a license is obtained, is in part directed by the act of 1797, and in part by the act of 1820, and does not depend exclusively upon either. This indictment alleges, that the defendant did not obtain "a license in the manner directed by the act concerning inns and taverns." To say that he had not obtained a license according to the act concerning inns and taverns, (which is the act of 1797) is not sufficient, for that act does not alone prescribe the mode of obtaining license. It is in part prescribed by the act of 1820. Therefore to negative the former act only, is not sufficient.

We express no opinion as to the manner in which the indictment comes before us, as no objection has been made to the bringing of it here by *certiorari*, on the part of the state, after having been quashed in the Court of Quarter Sessions.

Feb. 1829.

Tomlinson
v.
Burke & Clark

The quashing of the indictment affirmed.

JAMES R. TOMLINSON *against* BURKE AND CLARKE.

In an action brought by a firm, it is necessary to set out in the state of demand and proceedings, the christian names of the individuals composing the partnership, or the judgment will be reversed.

THIS was a *certiorari* brought to reverse a judgment of a justice rendered against Tomlinson, the defendant below, in his absence upon a state of demand, in the name of "Burke and Clarke, plaintiffs," without stating the christian names of the plaintiffs, and setting forth that the defendant owed the plaintiffs on a note of hand, &c. &c. The transcript, and all the proceedings in the cause were in the name of "Burke and Clarke."

W. Halsted moved to reverse the judgment, because the christian names of the individuals composing the firm of Burke and Clarke, were not set forth, either in the state of demand or the transcript.

Hamilton, contra, said, that there was no evidence before the court to shew, that Burke and Clarke had any christian names, or to shew that the words Burke and Clarke did not compose the name of only one individual. The note also upon which the action was brought, was drawn payable to Burke and Clarke without stating any christian names.

CH. JUSTICE. The reason assigned for the reversal is sufficient. There are several decisions in point.

Let the judgment be reversed.

Feb. 1829.

MATTHIAS WILLIAMSON *against* JAMES BROWN.Williamson
v.
Brown.

If from a judgment rendered by a justice in favour of a defendant, the plaintiff appeals, and on the trial of the appeal submit the cause to a jury, he cannot, by voluntarily withdrawing or neglecting to appear when called, obtain a nonsuit, or prevent a verdict being rendered against him.

M. WILLIAMSON brought an action in a plea of debt, against James Brown, before a justice of the peace. Brown filed an account by way of set off. On the trial, a verdict was found in favour of Brown for a certain sum, for which, with costs, judgment was rendered. Williamson appealed; and in the court of Common Pleas, the jury, after having heard the cause and withdrawn for a time, returned into court to render their verdict. Williamson did not appear, but the court received the verdict, which was again in favour of Brown, and rendered judgment upon it.

Scudder moved to reverse this judgment. He contended that Williamson had a legal right to withdraw, and of his own choice to submit to a nonsuit; and that the court, instead of receiving the verdict, should have dismissed the jury and rendered judgment of nonsuit.

John J. Chetwood, contra, relied on *Reed v. Rocap*, 4 *Halst.* 347.

BY THE COURT. Although not precisely the same in point of fact, this case is within the principles on which the decision was made in *Reed v. Rocap*.

Let the judgment be affirmed.

CASES
DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
State of New-Jersey,
MAY TERM 1829.

WILLIAM HENARIE, ADMINISTRATOR OF DAVID DRAKE,
DECEASED, against GEORGE MAXWELL.

IN ERROR.

An interest in the question in controversy, does not disqualify a person from being a witness; the interest which excludes a witness is an interest in the event of the suit.

If A. bring an action against B. for the amount of a due bill, given by B. to A. and B. pleads payment and gives notice of his intention to prove on the trial, that C. in his life time agreed to pay and did pay A. the amount of the due bill, and offers D. the executor and residuary legatee of C. to prove the fact of payment, C. is a competent witness for that purpose.

THIS case came before the court on a writ of error, directed to the Court of Common Pleas of the county of Hunterdon; on the trial of the cause before the Court of Common Pleas, bills of exception were taken to the opinion of that court, and the questions arising thereon, were argued at the last term by

Saxton and Vroom for the plaintiff in error;

Wurts and Wall for the defendant.

The facts in the case are sufficiently disclosed in the opinion of the court, which was delivered by

FORD, J. George Maxwell brought an action in the Common Pleas of Hunterdon, against William Henarie, as administrator

May 1829.

Henrie

v.
Maxwell.

of David Drake, dec. and declared on a due bill of the intestate for one hundred and twenty-five dollars. The administrator plead the general issue and payment, and gave notice of his intention to prove that Imla Drake, sen. undertook to pay the said bill, and that he paid and satisfied it, in his life-time, to the plaintiff. The parties went to trial on this point; but the plaintiff had to prove the execution of the bill, to which Imla Drake, jun. was subscribing witness; and he, subsequently to his attestation, had become *executor and residuary legatee* of the aforesaid Imla Drake, sen. dec. the person alleged in the notice to have paid the bill; for which reason the said executor was holden by the court to be an interested witness; and they permitted his hand-writing to the attestation to be proved by another person, and rejected him when offered as a witness on the part of the defendant. The defendant prayed a bill of exceptions to each of these opinions. If a witness, after attesting an instrument, becomes incompetent by subsequent events, there is no doubt but his hand-writing may be proved as if he were dead, or not to be found. The case turns, therefore, upon the question of his incompetency, and this depends again on the nature of his interest. Now, the undertaking of his testator to pay the due bill in question, certainly bound the *testator's estate* in the hands of his executor, and gave the legatee a plain interest in the extinguishment of the debt, which otherwise might fall upon and diminish the estate in which the legatee was interested; therefore, his interest in the question is so manifest that words can hardly make it plainer.

But an *interest in the question* does not disqualify one to be a witness at the present day; it is a *bias*, however, that may turn his mind out of a straight course, and as such may be shewn to a jury, and become a good reason for them to distrust his testimony when it stands alone, and much more so, if it stands opposed to the evidence of a disinterested witness, or is contrary to circumstances in the case of an opposite tendency; but it is not considered as rendering him incompetent by any of the modern decisions. Those which have been made in Westminster Hall, or even in the United States, to this effect, are too numerous to be particularly stated, and only a few of the leading ones will be mentioned. *Phillips*, in a review of the English cases, 1 *Phil. Ev.* 36, says, "it is scarcely possible

May 1829.

Henric
r.
Maxwell.

to reconcile the earlier cases with the modern ones touching the interest that renders a witness incompetent; at one time, an interest in the question disqualified him, &c.; but the rule now is, that the witness must be interested in the event of the suit." In the case of *Bent v. Baker*, 3 Term Rep. 36, Buller, J. explains this rule with great clearness; he says it is this, "Is the witness to gain or lose by the event of the suit? Can the verdict be evidence for or against him in any other suit?" The courts of the United States being equally embarrassed by the ancient cases, have almost universally, I believe, adopted the modern rule. It has been acted upon in New-Jersey ever since the case of *Bent v. Baker*. In New-York, it was fully established in *Van Nys v. Terhune*, 3 Johns. 83; and in Connecticut, in the case of *Phelps v. Winchel*, 1 Day 270. See also 5 Johns. 256, 144; 4 Taunt. 17; 1 Yeates 84.

Therefore, the legal test of competency is, whether the verdict will be evidence for or against the witness, in any action in which he himself may afterward be a party; if it will not, he is competent to be sworn, and the weight and credibility of the evidence he gives, must be submitted to the discernment and good sense of the jury, upon a consideration of the bias arising from his interest in the question. Now, if the administrator should be condemned to pay this money, by reason of the verdict in this cause being against him, he may immediately bring an action against the witness, as executor, for his testator's neglect to pay the due bill according to his undertaking; and if the executor should plead that the testator in his life-time, did pay the money to Mr. Maxwell, could this verdict between other parties be evidence against him? Could it debar him of proving the truth of his plea, or conclude his rights? Nay, could it be received even to prejudice them? Baron Gilbert in his law of evidence, page 29, says thus, "If a verdict be had on the same point and between the same parties, it may be given in evidence, though the trial was not had for the same lands; but the verdict ought to be between the same parties." And for this he gives the most forcible reasons; otherwise, he says, a man would be bound by a decision where he had not the liberty to cross examine, nor to controvert, nor to appeal, if he supposed the verdict wrong. If the executor had been a party to the other suit, with the privilege of adducing papers,

May 1890.

Henarie
v.
Maxwell.

and of calling and examining witnesses, the verdict might have been the other way; he might have called other witnesses; he might have produced other papers; perhaps Mr. Maxwell's receipt for the money, or David Drake's receipt for the payment of it to him. And is he to be concluded, or even prejudiced, by the event of a suit *between other parties*, in which he could have subpoena for neither a witness, a book or a paper, nor give notice for the production of one, in which he had no right to be served with a notice of trial, and might have been sick or absent on a journey when the cause was tried? In point of law it is *res enter alios acta*. He might as well be bound by his neighbour's bond. How came another man to be the guardian of his rights, so as to take away from him the privilege of defending himself? Such a guardian, either from ignorance, indolence, carelessness, or collusion with the opposite party, might have made only half a defence. The record would condemn the executor before he was heard. If what the court incidentally said to the contrary of this doctrine, in *Emmertson v. Andrews*, 4 Mass. 653, were entitled to more weight, as an *obiter dictum*, not being the point before the court, than it is on that account, it would be sufficiently overbalanced by the weighty passage cited above from *Baron Gilbert*, and the sound reasons assigned by him, without adducing the very respectable opinion of *Spencer, J.* in *Case v. Reeve*, 14 Johns. 81, where he says, "a suit between two persons, does not bind or affect a third person, who could not be admitted to make a defence, to examine witnesses, or to appeal from the judgment." The principle being, therefore, fully established in the ancient and modern books, by the opinion of the ablest writers on judicial proceedings, and in decisions of the most enlightened courts of judicature, that any verdict in this cause would be no evidence for or against the witness in any other action in which he might hereafter be a party, it follows, that his interest in the question should have been left to the jury as only affecting his credit, and not have been held as totally destroying his competency; which latter opinion, in this view of the matter, was erroneous, and, consequently, must be fatal to the judgment.

The Chief Justice did not sit in this cause.

PHILLIP GRIFFITH *against* GEORGE WEST.

May 1829.

Griffith

v.
West10 301
64 515

CERTIORARI.

In actions by informers on penal statutes, the justice is required to make a special note of the day, month, and year, of its institution. And this note should be made at the time or on the day of the commencement of the suit; and if the justice omits to make the entry until the return of the summons, the judgment will be reversed.

WHITE, for the plaintiff.

Sloan, for the defendant.

The Chief Justice delivered the opinion of the court.

The action before the justice was brought for penalties under the "act to prevent the unlawful waste and destruction of timber in this state." In answer to a rule, the justice says, "At the time of the commencement of the above action before me, I issued several other summonses, at the request of the plaintiff, for persons whose names were contained in a list sent by him to me, and when I was about to enter the actions in my docket, immediately after delivering the summonses to the son of the plaintiff, I discovered that he had taken with him the list of names from which I had caused the writs to be filled up, so that I could not enter them until the process was returned to me, after being served; when I entered them."

The act relative to suits instituted by common informers, which regulates the present case, for the owner sues as a common informer, although entitled, as owner, to one moiety of the penalty, requires that upon every action which shall be instituted by any informer on a penal statute, a special note shall be made of the very day, month, and year, of its institution; and that such action shall be of record from that time and not before; and that no manner of ante-dating thereof shall be made or allowed. The obvious intent of this clause, although not fully expressed, is, that the note should be made at the time, or on the day of the commencement of the suit. It should not be suffered to rest on the memory of the justice until a future day, whereby, in many cases, the wise provision of the act might be frustrated. It is to be made by the entry of the action on the docket of the justice; the date in the process is not sufficient. The omission in the present case, to make, until after the return

May 1829.

Young
r
Stout.

of the summons, the entry required by the act, is an error in the proceedings before the justice, for which the judgment should be reversed.

10 302
00 263

ADMINISTRATORS OF WILLIAM YOUNG, DEC. against THOMAS STOUT.

CERTIORARI.

To authorize a justice to enter an action "by agreement of the parties without process," under the 18th section of the act for the trial of small causes, (*Rev. Laws 634*.) the plaintiff and defendant should appear before the justice to manifest their consent, or some person on behalf of the plaintiff, having competent authority, and such authority should be verified before the justice.

The defendant can, with no propriety, become the representative of the plaintiff, more especially to communicate to the justice the agreement of the parties for the entry of an action.

A judgment rendered on the confession of the defendant in an action entered by consent of the parties, without process, and without the appearance of the plaintiff, or any person legally authorized to represent him before the justice, will be reversed on the application of the personal representatives of the defendant.

WALL, for the plaintiff.

Saxton, for the defendant.

EWING, C. J. After the names of the parties, and the style of action, the following entry was made by the justice on his docket, as appears by the transcript returned with the *certiorari*: "This action was entered on by the consent of the parties." Then follow a confession by the defendant, and a judgment for the amount confessed, with costs. In answer to a rule, the justice has certified that the defendant only, not the plaintiff, appeared before him; that he said he had been to the plaintiff, and on settlement had fallen in his debt, for which they had agreed he was to confess a judgment; that he gave to the justice an instrument of writing signed by the plaintiff, which is in the ordinary form of a state of demand, with a note at the bottom that the defendant agreed to confess judgment before the justice for the above stated demand, with costs; and the justice says, that on his acquaintance with the hand-writing of

the plaintiff, and on the confession of the defendant, he gave judgment.

May 1829.

Young
v.
Stout.

This proceeding is entirely too loose and irregular to be supported. The statute provides that "where parties agree to enter, without process, an action before a justice of the peace," he shall proceed thereon. To make this agreement manifest before the justice, the plaintiff, as well as the defendant, should appear, or some person on behalf of the plaintiff having competent authority; and such authority should be verified before the justice. The defendant can, with no propriety, become the representative of the plaintiff, more especially to communicate to the justice the agreement of the parties for the entry of an action. Such a procedure would be open to the most dangerous abuse. A creditor might find a judgment in his favour, without his knowledge, for only the half of his demand, which would cost him the other half to annul, by legal measures. Nor could the writing, which the defendant delivered to the justice, serve the place of a proper representative of the plaintiff. It may, perhaps, be too severe a criticism to say, it contains no agreement for the entry of an action. But if it were, in this respect, of the most full and formal character, the justice should not have received or acted upon it. Neither his belief that the paper was the hand-writing of the plaintiff, nor the assurance of the defendant was a legal verification; and even if verified, such a paper was not a proper authority for the entry of an action, nor a compliance with any construction which can safely be given to the statute.

The action, therefore, was entered without legal authority. A confession of judgment cannot be made in a justices' court, as has been several times decided, unless an action is depending there.

We have had some hesitation in yielding to the reversal of this judgment, at the instance of the party, or rather the administrators of the party, for the defendant, since the judgment has departed this life, on whose representation it was rendered. We are persuaded, however, that greater mischiefs would result from giving sanction to such illegality; and the duty of the justice certainly required him to have refused to enter the action.

Judgment reversed.

May 1829.

Ackley
v.
Elwell.

DANIEL R ACKLEY *against* JONATHAN RICHMAN AND ABRAHAM M'CALTIONER, ADMINISTRATORS OF JOHN ELWELL, DECEASED.

A declaration on a contract for the sale of lands at auction, one of the conditions of which was "that the purchaser should pay the purchase money, and the vendors deliver a deed for the premises within six days from the day of sale," should contain an averment of a tender of the purchase money, by the plaintiff; an averment merely that the plaintiff was ready and willing to perform all things on his part to be performed, and to pay the purchase money and complete the contract is not sufficient. And the same averment is necessary where the contract was that the purchaser should pay the purchase money "on the 15th of September 1827, on having a good and sufficient title made to him for the land."

FIELD, for plaintiff in error, cited and commented on the following cases. 1 *Chitty pl.* 317; *Rawson v. Johnson*, 1 *East* 202; *Waterhouse v. Skinner*, 2 *B. & P.* 447; *Martin v. Smith*, 6 *East* 655; 2 *Saund.* 352, n. 3; *Doug.* 685; *West v. Emmons*, 5 *John.* 179; *Porter v. Rose*, 12 *John.* 289; *Miller v. Drake*, 1 *Caines* 45; 2 *Chitty* 158; *Plowd.* 180; *Hearne's plead.* 131; *Clift.* 97.

R. P. Thompson and *M' Culloch*, for the defendants in error, cited and relied on the following cases. *Callonel v. Briggs*, 1 *Salk.* 112; *Goodeson v. Nunn*, 4 *T. R.* 761; *Morton v. Lamb*, 7 *T. R.* 125; *Lea v. Exelly*, *Cro. Eliz.* 888; *Catlin v. Jackson*, 8 *John.* 429; 1 *Saund.* 320, n. 4; *Harvey v. Trenchard*, 1 *Halst.* 126.

The Chief Justice delivered the opinion of the court.

This case comes before us on a writ of error to the inferior Court of Common Pleas of the county of Salem, upon a judgment rendered by that court in favor of the defendants below, also defendants here, on a demurrer to the declaration.

The declaration is on a contract for the sale of land by the defendants to the plaintiff, and contains two counts. In the first count after reciting a sale at public auction on the following, amongst other conditions; "that is to say, that the purchaser should pay the purchase money, and the vendors deliver a deed for the premises within six days from the day of sale"; and that the plaintiff became the purchaser, for the sum of two hundred and thirty three dollars; and after stating promises on each

part to perform all things contained in the said conditions of sale, the plaintiff avers, that he was ready and willing to perform and fulfil all things in the said conditions contained, on his part to be performed and fulfilled, and to pay the purchase money and complete the purchase ; and alleges a breach on the part of the defendants, the vendors, in not delivering to him a deed, for the premises. In the second count, the plaintiff sets out that he had bargained with the defendants for a tract of land, and had promised to pay them the purchase money, "on the 15th day of September 1827, on having a good and sufficient title made to him for the said tract of land" ; and that they had promised to deliver him on the said 15th day of September, a good and sufficient deed for the said tract of land ; and then avers that on the said day he was ready and willing to perform all things on his part to be performed, and to pay the purchase money and complete the purchase, and alleges a breach on the part of the defendants in not delivering the deed.

May 1830.

Askley
Elwell.

The objection raised to this declaration on the demurrer is, that the plaintiff alleges only a readiness and willingness to perform by payment of the purchase money, but does not aver a performance or offer to perform or tender of the purchase money.

The doctrine on this subject is laid down with much clearness and precision by the Supreme Court of the United States in the *Bank of Columbia v. Haguer*, 1 Peters 464. "In contracts of this description, the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he had paid it."

"Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent, yet it is evident the inclination of courts has strongly favored the latter construction as being obviously the most just. The seller ought not to be compelled to part with his property, without receiving the consideration, nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either a vendor or vendee wish to compel the other to fulfil his contract, he must make his part of

May 1829.

Ackley
v.
Elwell.

the agreement precedent, and cannot proceed against the other without an actual performance of the agreement, or a tender and refusal. And an averment to that effect, is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof."

The good sense and sound policy of the doctrine thus laid down by the Supreme Court of the United States, will appear on very little reflection. The parties to a contract for the sale of land, unless there is something peculiar in its structure, expect and intend the performance on each part at the same time. The delivery of the deed and the payment of the money are to be simultaneous. Each supposes he is to perform upon a correspondent performance on the other part. Neither supposes he is bound to perform if the other neglects or refuses, and is to resort after performance to a remedy on the covenant. Neither supposes he is liable to an action by the other, when the other has not performed or offered to perform. The vendor does not mean to deliver the deed, and rely on the uncertain fruit of a suit at law for his pecuniary recompense. Such is the ordinary understanding and intention of parties, in whatever language the scrivener may clothe their contract. They intend to create what are denominated concurrent or dependent covenants, and not those called independent, where each party must rely on the promise and not on the performance of the other.

In *Goodeson v. Nunn*, 4 T. R. 764, Lord Kenyon described dependent covenants to be, "where, when the one party conveyed his estate, he was to receive the purchase money, and when the other parted with his money, he was to have the estate. They were reciprocal acts to be performed at the same time." And he laid down this rule, "that where they are dependent, no action will lie by one party unless he has performed or offered to perform his covenant." *Sergeant Williams* in his valuable note to *Pordage v. Cole*, 1 Saunders 230, deduces from the cases, the following among other rules with respect to the averment in the declaration: "Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof, B. covenants to pay A. a sum of money on the same day, neither can maintain an action without shewing performance, of, or an offer to perform, his part, though it is not certain which

May 1829.

Ackley
Elwell.

of the court, said : " the covenants in this case The whole consideration money was to be paid on the payment the deed was to be given ; the current. Then the question arises, whether the an maintain this action without an actual The averment in the declaration is willing to convey." And the aver- be insufficient. In *Green v. Rey-* " The one thousand dollars for the deed, and to be paid delivered, the fair intent he money is not to be the declaration there- deed by the plain- tant of the one and of the ute at the money. at of

the de.
of the purchase money, the
other to fulfil his contract, should have agreement precedent, have made a tender, and inserted an averment in the declaration.

The case of *Harvey against Trenchard*, in this court, reported in 1 *Halst.* 126, is in point. The defendant contracted to convey certain land to the plaintiff the next Wednesday, when the plaintiff was to pay him. The court said, the conveyance and the payment for it were to be done at the same time, and neither party can sue without averring performance or tender on his part. The plaintiff pretends to neither, he only says he was " ready to pay." The same principle was sanctioned by a decision of this court, in *Stout against Farley*, at February term 1816, of which I do not find any report in print, and by the earlier case of *Johnson v. Applegate, Cox* 233.

There is, however, another count in this declaration, and on the part of the plaintiff it is insisted that no other averment than it contains of readiness and willingness to perform, was requisite, because, from the language of the contract there set forth, the delivery of the deed was made a condition precedent to the payment of the money. The plaintiff promised to pay to the defendants the purchase money, " on the 15th day of September, 1827, on having a good and sufficient title made to him for the said tract of land." And the defendants promised to deliver to him on that day a good and sufficient deed.

According to the settled rules for the construction of cove-

May 1829.

Ackley
v
Elwell.

nants, their nature and precedency depend on the meaning and intention of the parties, rather than upon particular phrases or forms of words. 3 *Halst.* 242; 2 *New. Rep.* 240; 6. *John.* 56; 2 *John.* 148. Lord Mansfield said: "The dependence or independence of covenants was to be collected from the evident sense of meaning of the parties." *Doug.* 689. In *Hotham v. E. I. Company*, 1 D. & E. 645, *Ashurst, J.* said: "There are no precise technical words in a deed to make a stipulation a condition precedent or subsequent. Neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been constructed to operate as either the one or the other according to the nature of the transaction."

The just interpretation of the present agreement is that both acts were to be performed at the same time. As the money was to be paid on the delivery of the deed, the acts were to be simultaneous. At the delivery, would have equally and fairly expressed the meaning of the parties. And such will be seen to be the construction, repeatedly sanctioned in the books, where there is nothing in either act which necessarily presupposes and requires the antecedent performance of the other. Chief Baron Gilbert, in his treatise on the action of debt; *Gilb. cases* 366, lays down a rule respecting executory contracts in the following manner: "If A. had promised to deliver the horse on a day to come, and B. promised on such delivery to pay ten pounds, there if A. deliver or tender the horse at the day he has a right to the money. So, if B. at the day tender or pay the money, he has a right to the horse. But B. has no right to the horse without the tender of the money, nor A. any right to the money without the tender of the horse." In *Callonel v. Briggs*, 1 *Salk.* 112, on an agreement to pay a certain sum of money six months after the bargain, the plaintiff transferring stock, Lord Holt said, "if either party would sue on this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender." In *Parker v. Parmele*, 20 *John.* 130, the vendor sued on a covenant for sale of land, whereby the vendee covenanted to pay the purchase money on the 1st January 1818, and the vendor agreed that "upon the faithful performance of the covenants aforesaid," he would execute a deed. *Spencer, C. J.* in deliver-

May 1829.

Ackley
Elwell.

ing the opinion of the court, said : " the covenants in this case are dependant. The whole consideration money was to be paid on that day ; and on the payment the deed was to be given ; the acts were to be concurrent. Then the question arises, whether the plaintiff, the vendor, can maintain this action without an actual tender or offer to convey. The averment in the declaration is only that he was ready and willing to convey." And the averment was held by the court to be insufficient. In *Green v. Reynolds*, 2 John. 207, the court say : " The one thousand dollars being in part of the consideration for the deed, and to be paid on the same day the deed was to be delivered, the fair intent and good sense of the contract is, that the money is not to be paid until the deed is ready for delivery. The declaration therefore is defective in not averring a tender of the deed by the plaintiff." In *West v. Emmons*, 5 John. 179, the covenant of the one party was to convey a lot of land on a fixed day, and of the other party, by whom the action was brought, to execute at the same time a bond and mortgage for the consideration money. *Vanness, J.* said : " The question is, whether the averment of the plaintiff's readiness on the day to execute the mortgage is, or is not sufficient to entitle him to maintain this action, and the decision of it will depend on the true construction of the agreement. In reason and good sense it ought not to be required of the plaintiff to seal and tender a mortgage of the property agreed to be conveyed to him before he had obtained a title to it from the defendant. And as there was therefore; nothing to be done by the plaintiff which he had the power, or what in legal acceptance means the same thing, he had a right to do, the averment in the declaration is sufficient." The learned judge adds, " There are cases where both parties have the power to perform without any act being previously necessary to be done by the other. In all such cases, it is necessary that the party bringing an action should aver, if the act has not been actually performed, a tender and refusal which is equivalent to a performance." In *Glazebrook v. Woodrow*, 8 D. & E. 366, *Le Blanc, J.* said : " This is the case of a covenant for the sale of a school house, where the plaintiff covenanted to convey on or before a certain day, and the defendant on or before that day covenanted to pay him. The payment therefore, is the consideration for the conveyance, and cannot be enforced till that be made or at least offered to be

May 1829

Ackley
Elwell.

made by the plaintiff." "This case, falls within the rule first laid down in *Kingston v. Preston*, that no person shall call upon another to perform his part of a contract, until he himself has performed all that he has stipulated to do as the consideration of the other's promises. This rule, I think, applies to every case of a sale of property where one engages to convey on a certain day, and the other to pay at the same time, and this, whether the one be stated in terms to be in consideration of the other or not. In neither case, will the court compel one party to perform his part until the other has done or has offered to do his own."

In *Goodeson v. Nunn*, already cited, the plaintiff agreed that he would on or before the 2d of September, then next, grant, sell, release, or otherwise convey to the defendant certain premises, in consideration whereof the defendant covenanted to pay to the plaintiff a sum of money on or before the said 2d day of September next ensuing. These were held by the court to be dependent covenants, to be performed at the same time, and *Lord Kenyon* said "If they be dependent covenants, performance, or the offer to perform, must be pleaded on the one part, in order to found the action against the other."

The plaintiff's counsel, justly appreciating the value of approved precedents, refers to those in 2 *Chitty* 125, and in *Plowd.* 180, to support this declaration. The former, however, it will be observed, is on a contract of a peculiar nature. "The good title" which was to have been made out at the expense of the vendor, and the failure to perform which is the ground work of the action, is not the same thing as "the proper conveyance" which was to have been made at the purchaser's expense. And in the latter precedent, the money was by the express terms of the agreement, "to be paid immediately after the delivery of the wheat."

Upon the whole, although it must be admitted there is some incongruity in the cases in the books on this subject, and to reconcile them all would, if attempted, be found a difficult task, it appears to us that in the case before us and upon the terms of the contract stated in either count of this declaration, a readiness or willingness on the part of the plaintiff to perform his part of the contract was not sufficient. To entitle him to maintain an action, he should have done more, he should have performed, or

offered or attempted to perform his part. And consequently, the declaration should have contained a suitable averment.

May 1829.

We find no error therefore, in the judgment of the Court of Common Pleas.

St. Mary's
Church
v.
Wallace

Judgment affirmed.

10	311
662	642
10	311
66	40

THE MINISTERS, CHURCH WARDENS AND VESTRYMEN OF THE
PROTESTANT EPISCOPAL CHURCH OF ST. MARY IN THE CITY
OF BURLINGTON *against* JOHN B. WALLACE AND OTHERS.

In an action against the surviving heirs of an obligor upon a bond of their ancestor, the heirs of a deceased heir having lands by descent, should be joined in the action, and if they are not, the non-joinder may be pleaded in abatement.

WALL argued in support of the plea in abatement, and cited 2 *Saund.* 7, note 4; 2 *Chitty Plea.* 209.

Kinsey for the plaintiff cited, *Bac. abr. tit. Heir and Ancestor, G. H.*; 2 *Tidd's prac.* 354, 152; *Rev. Laws* 432; *Jac. Law dict. tit. Heir* 32; 6 *John. Rep.* 59.

EWING, C. J. Joshua M. Wallace bound himself and his heirs in a bond for the payment of a sum of money. He died, leaving lands which descended to his children as his heirs. Afterwards Joshua M. Wallace, jun. one of these heirs died, leaving children to whom, as his heirs, descended the share he had taken by descent from his father. And at the commencement of this suit, the lands descended were held by the surviving heirs, and the heirs of the deceased heir as tenants in common. This action is brought against the surviving children of Joshua M. Wallace, the obligor. And there is a plea in abatement for the non-joinder of the heirs of Joshua M. Wallace, the younger, to which plea, the plaintiffs have demurred.

These are the facts as presented by the pleadings; and the question is, whether the heirs of the deceased heir, having lands by descent, should have been joined in this action with the surviving heirs.

The heir of an obligor being named in the obligation, is bound for the payment of the debt, provided he have lands by

May 1829.

St Mary's
Church.
g.
Wallace.

descent from the obligor. We are told in the books that two things must combine in order to bind or charge the heir; being named in the obligation, and having lands by descent. Thus in *Boyer v. Rivet*, 3 *Bulstrode* 319, by *Whitlocke, J.* "An action of debt brought against the heir stands on two reasons. 1. Upon the contract of the father, because the heir is bound with the father in the bond. 2. There are two things to bind the heir, his being bound with his father in the obligation, and the land which he hath in possession for to charge him." It is manifest however, that the real ground of charge upon the heir, the true and efficient cause of his liability, is the descent to him of lands from the ancestor. Without such descent, although named and expressly bound in the obligation, he is subject to no responsibility. The debt is sometimes called the debt of the heir, and when sued the action is in the *debet* and *detinet*; but it becomes his debt in truth by reason of the lands descended. By the taking of the lands he charges himself. Thus in *Smith v. Parker*, 2 *Wm. Black. Rep.* 1232. *Chief Justice De Grey*, says: "The heir of the obligor is debtor to the obligee but only liable to pay the debt in respect of the assets which descended to him." And in *Plowden* 440, "When the heir denies assets and it is found against him, or when he does not deny assets but pleads other matter which implies that he has assets, the debt of his ancestor has become his own debt in respect of the assets which he has in his own right, and so the property of the land which he has in his own right makes the debt to be his own proper debt, for which reason the writ shall be in the *debet* and *detinet*."

It is thus seen that the descent of lands upon the heir creates his liability; and if he have the lands at the time he is sued, he may, by a proper course of pleading, subject them only, and not himself or his other estate, to the payment of the debt. If he admit the debt and confess and specify the lands descended, the judgment must be special to be levied of those lands. *Plowd.* 440.

If the lands have passed through more than one descent, the heir of the heir is liable upon the bond of the ancestor, from whom the lands originally descended; and upon the same ground, because of the lands descended. *Dyer* 368; *a.* The liability continues, says one of the books, to many generations.

May 1829.

St Mary's
Church
v.
Wallace.

In the present case then, the heirs of the ancestor are bound by reason of the lands descended to them; and the heirs of the deceased heir, for the same cause, the lands descended to them, are likewise bound.

But to enforce this obligation, is one action to be brought against all? Are all to be joined in one suit?

Inasmuch as they are answerable by reason of the lands descended; and as by due pleading they may subject the lands and the lands only to the discharge of the debt, there seems an obvious propriety in uniting all in one common suit; as, if part only are sued, the creditor may obtain judgment against part only of the lands, and may be compelled to resort for the residue of the lands, to an action against the other heirs? Moreover if the heirs have parted with the land they will by apt pleading on their part be charged with the value only. The surviving heirs in the present case then would not be chargeable, unless by false pleading, with the whole debt, if it exceeded the value of the lands descended; nor even with the value of the whole lands descended, but with the value only of the portion which descended to them. And in such event for the residue, the obligee, if the surviving heirs only are sued, must resort to the other heirs.

This case bears no analogy to that of the surviving obligors of a bond, against whom the whole cause of action survives, and who are liable for the whole demand and can by no possible course of pleading subject themselves to part only.

The principles which are to be found in the books, satisfactorily evince the necessity of uniting all these heirs in one suit.

If a man be seized of lands in gavelkind, and hath issue three sons, and by obligation binds himself and his heirs and dies, an action of debt shall be maintainable against all the three sons, for the heir is not chargeable unless he hath lands by descent; *Co. Lit.* 376, *b*. If one binds himself and his heirs and leave lands at common law and lands in gavelkind, the obligee must sue all the heirs; *Hob.* 25. When coparceners are in by one descent, if the one has issue and dies and these issue enter, yet they shall be in as parceners, and therefore he who brings *precipe quod reddat* shall have it against them by one joint *precipe*; 4 *Viner tit. Action, Joinder D. d. 4, in marg.* Parceners should, before partition, be jointly sued though they be entitled to the estate by different descents; 1 *Chit. plead.* 29. If there are se-

R F

May 1890.

St. Mary's
Church.

Wallace.

veral heirs to the property chargeable, one not being liable more than another all must be sued jointly; *Com. dig. tit. abatement F. 9*. In *Boyer v. Rivet*, 3 *Bulstr.* 320, *Jones, Justice* said, "If one doth bind him and his heir in a warranty, covenant, debt, or annuity, the heir shall be subject for the land; all the heirs to be equally charged; and if one heir be sued severally by himself, he shall have contribution against the others." In the note of *Sergeant Williams* to 2 *Saund.* 7, he says, "If there be several heirs, such as parceners, heirs in gavelkind, or borough English, and one only becharged, he is entitled to contribution from the others, and, therefore, may plead" that the others are not joined. It is true, the learned annotator is speaking of a *scire facias* against the heir; and in some respects there is a difference between a *scire facias* on a judgment or recognizance, and an action of debt on a bond, as respects the heir; but not in this particular, where he is entitled to contribution, or in other words, that other persons should share the charge with him; and this duty of contribution gives, according to the annotator, the right to the plea.

The case of *Hawtrie v. Auger and others*, 2 *Dyer*, 230, is in point. It was thus: Sir Anthony Auger being seized in fee of divers lands in gavelkind, bound himself and his heirs, in a bond, and had issue three sons, and died seized, and they entered, and the eldest had issue a daughter and died. And debt in the *debet* and *detinet* was brought against the two sons and the daughter of the deceased son, as heirs. The same case is reported in *Moore* 74, *pl.* 203, where the reporter seems to have had some doubt whether the daughter was liable; for he subjoins a *quere*, whether, she being heir of an heir, should be chargeable with the obligation; but he had no doubt, or at least he has expressed none, whether, if chargeable, she was rightly joined in the action. The case is also reported in *Bendloe* 146, where the declaration is given.

It was insisted in argument, on the part of the plaintiff, that if the heirs of the heir are included, difficulties will arise in the apportionment of the recovery, and the form of the judgment. But it is obvious, that no more serious difficulties can occur than may arise in every case where several heirs are defendants. One may confess the action, and show the certainty of the assets; another may plead alienation in good faith before action

May 1829.

St Mary's
Church
Wallace

brought; and another, *riens per descent*, or some other plea which he knows to be false. In all these cases the form of the recovery will differ. In *Cary v. Pooley*, 2 Keble 388, pl. 3, an action of debt was brought against four co-heirs, and on several issues on *riens per descent*, assets were found as to one, and as to the rest that they had nothing, having aliened before the writ; whereon judgment was given against her that had assets *quod recuperet debitum et damna*, generally *de bonis propriis*, and on error in K. B. that judgment of C. B. was affirmed.

I am of opinion the heirs of the deceased heir, in the present case, may be, and ought to be, joined in the same suit with the surviving heirs; that the plea in abatement is therefore sustained; and judgment should be rendered for the defendant.

FORD, J. Joshua M. Wallace and his son Joshua M. Wallace, jun. made an obligation to Rebecca Cox, in \$2000; for the payment whereof, they bound themselves and their heirs, *jointly and severally*. The plaintiffs having obtained an assignment of this obligation, and Joshua M. Wallace, jun. having departed this life since his father, the plaintiffs brought their action against the *surviving heirs of Joshua M. Wallace*, without taking notice of the heirs of Joshua M. Wallace, jun. deceased. Wherefore, Eliza B. Wallace pleads, that the estate whereof Joshua M. Wallace the elder, died seized, descended at his death, to these defendants and Joshua M. Wallace, jun. as tenants in common; that the latter died, leaving four children, whose father's share has descended to them, and that they hold the same as tenants in common with the defendants; and because the said children are not summoned, she prays that the writ may be quashed. To this there is a demurrer and joinder.

The question is, whether the heirs of a *deceased heir* ought to be included with the surviving heirs in one action. It is admitted that the heirs of a deceased heir are *liable to contribution* in respect of the lands descended to them from the obligor; and it follows, as a necessary consequence, that they must be liable to a suit in some form; otherwise, if all the heirs happened to be dead *except one*, and his seventh was adequate to pay only half the debt, the creditor would have to lose the residue, not because there was not an abundance of assets, but because they were not accessible. As, therefore, the heir of a

May 1829.

St. Mary's
Church
v.
Wallace.

deceased heir must be liable to an action in some form, they will be plainly benefited by being included with the survivors in the same writ, as it will be the easiest way in which they can make contribution, and will relieve them from all but their proportion of the costs; it will also average the debt on all the lands descended, instead of its being concentrated on a part; and it will likewise benefit the creditor by subjecting all the lands at once to the payment of his debt, instead of only a part of them. And I take the law to be as plain in principle, as the reason of the thing.

There is a lien by recognizance, which binds all lands of the cosutor, in the hands of his heirs and alienees, to contribution; and there is a lien by the debt of an ancestor which binds all the lands of such ancestor, in the hands of his heirs and devisees, to contribution; and the analogy between these liens proves the propriety of including in one action all those who are bound to contribute to them. In the case of *Jefferson v. Morton*, 2 *Saunders* 6, there is a record of proceedings on a recognizance, very much in point. A *scire facias* being sued out against the heir and five vendees of a cosutor, and the sheriff having returned that there was no heir in his bailiwick, and that he had summoned the others; those five ter tenants appeared and pleaded that they were not bound to answer, because there was another ter tenant of the name of Jackson not named in the writ; whereupon the cosutree prayed for a like *scire facias* against the said Jackson, and it was granted. *Sergeant Williams*, in note 10, makes the following remark: "the reason of this plea seems to be, because every tenant of the land is entitled to have contribution, that is, all the lands of the cosutor in the hands of the several purchasers, must be extended and equally charged, and unless all the tenants be warned, the others are not obliged to answer." So it is, if two persons make a joint warranty, whereby the charge on them is equal, and one of them dies, the survivor and the heir of the deceased party ought to be vouched together. *Herbert's case*, 3 *Osht*, 14. a. Now the right of contribution belongs to the heirs of a deceased heir as much as to the heirs that are not deceased; and, therefore, they may be sued together with as much congruity as a living warrantor, and the heir of a deceased warrantor may be vouched together for contribution. When *Sergeant Williams*

May 1829.

St Mary's
Church
v.
Wallace.

says, that every tenant of the land is entitled to have contribution he must be understood according to *Lord Coke's* definition of contribution in 3 *Rep.* 14, b. "Note reader, when it is said before and after in our books, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow unto him any thing by way of consideration, but ought to be intended that the party who only is extended for the whole, may have *audita querela* or *seire facias* as the case requireth, to defeat the execution and drive the connusee to sue execution of the whole land, so in this manner every one shall be contributory, that is, the land of every tenant shall be equally extended." Now, the form given for an execution in *Rev. Laws* 432, sec. 6, instead of repelling a contribution by all the heirs, as here required, goes directly to confirm it, by requiring a levy to be made on the lands of the ancestor in the hands of his heirs, whereby it means all his lands, and not some of it only; and all his heirs, not some of them only. It is objected, that the heirs of the deceased heir are not heirs in this case of their grandfather. This is truly so; nor are they to be called *his* heirs in pleading. In 2 *Saunders*, 7, note 4, it is observed, that if a declaration be against the defendant as heir of the obligor, and it appear that he is only the heir of an heir, that the variance will be fatal; and therefore, he says, where lands have descended from the obligor to another who has died seized, and from him to the defendant, the descent must be stated specially, as that the defendant is the heir of A. who was the heir of the obligor; thus shewing, that lands descending to the heir of an heir, are liable to contribution, and prescribing the mode of declaring in such a case. Now the plaintiffs may declare against the surviving heirs, and the heirs of a deceased heir, in the mode here mentioned, without the least incongruity, seeing that the latter are as much liable, in respect of the lands of the obligor in their hands, as the former. None of them are liable as makers of the bond; and the only reason why they are liable in the debt is, that they take the assets in their own right, and not in *autre droit*, like executors or administrators. Therefore, it is said, in *Bac. Ab. title Heir, letter G.*, that they are to be sued as if it was their own debt; not that it is their debt or contract, or that they are at all liable otherwise, than in respect of the lands

May 1889.

St. Mary's
Church
v.
Wallace.

descended to them from the ancestor. It is, therefore, no personal contract, nor any thing more than a *lien* on lands descended to them from an ancestor for his debt.

The idea that a *lien* survives against survivors, is altogether fallacious. In 3 *Rep.* 14. *a. Herbert's case*, it is said, that a joint lien which bindeth the land shall not survive, or lie only on the survivor; as on a joint warranty the survivor shall not be only vouched. The doctrine of survivorship is applicable to persons and contracts, but not to liens on land. It cannot survive against survivors, and render them liable for the whole charge; but it rests on *all the lands descended* so long as they remain in the hands of any person by descent. Whether the right and title to contribution shall be lost in respect of lands alienated by an heir, or whether the others may compel the creditor to bring him into the suit, in order to subject him to contribution according to the value, for the relief of the other heirs, is not a point at present before the court, and I purposely avoid giving any opinion upon it.

In 2 *Co.* 25, *b.* it is said, if a man bind himself and his heirs in an obligation, and have heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged; and it is added in another book, that the plaintiff shall have *several actions*, but that execution shall *stay* till it may be had against both of them. The reason is not mentioned for *separate actions* in that particular case, nor is it very apparent, inasmuch as each set of heirs is entitled to *contribution* from the other; and after all, the affinity between these separate actions makes them so nearly in the nature of one, that execution against one shall *stay* till it can be had against both. But the general rule I conceive to be otherwise. It is said, in note 10, to 2 *Saund.* 7, "that if there be *several heirs*, such as co-parceners, heirs in gavelkind, or borough English, and one only be charged, he is entitled to contribution from the other heirs, and therefore, may plead this plea," to wit, in abatement; plainly implying, that all who are liable to contribution must be joined in the same proceeding, the *gravamen* of the plea being that some are omitted.

DRAKE, J. concurred.

May 1829.

THE STATE *against* THE JUDGES OF THE INFERIOR COURT OF
COMMON PLEAS OF THE COUNTY OF SALEM.

State

v.

Salem Pleas.

ON AMERCEMENT.

If a plaintiff assigns all his interest in a suit to A. and B., and then takes the benefit of the insolvent law, and the sheriff is appointed his assignee under the insolvent act, and the suit is carried on to judgment and execution, and the sheriff raises the money thereon, but does not pay it over to A. and B., an amercement will not be ordered against him, without proof that he had notice of the assignment to A. and B., and that he had voluntarily omitted or neglected to pay them after such notice.

THIS was a *certiorari* to the Court of Common Pleas of the County of Salem, to bring up an order of amercement which had been made against the sheriff. The following is the state of the case agreed upon by the attorneys of the parties: "A summons was issued out of the Inferior Court of Common Pleas of the county of Salem, returnable to March term 1827, at the suit of Mason S. Gibbon against Jonathan Belton, upon a promissory note. Which suit was continued in the name of the original parties, although the said Mason S. Gibbon, after the commencement of the said suit, to wit, on the 16th day of February, A. D. 1827, assigned all his interest to the said note to James Brooks; and the said James Brooks, on the 15th day of June 1827, assigned all his interest in the said note to Daniel E. Miller and John Cooper, merchants of the city of Philadelphia. The suit was prosecuted for the use of the said Miller and Cooper; and at September term 1827, judgment was entered in favour of the plaintiff for the sum of \$305.62 1-2. Execution was issued, and the money was collected and received by the said Edward Smith, sheriff as aforesaid. Notice of amercement having been duly given by the attorney on record of the plaintiff, the Court of Common Pleas of the county of Salem, in the term of June 1828, rendered judgment of amercement against the said Edward Smith, sheriff as aforesaid.

The said Mason S. Gibbon, being insolvent, applied to the Court of Common Pleas, at March term 1827, and such proceedings were thereupon had, that the said Gibbon was on the 16th day of June 1827, discharged according to the prayer of his petition, and the said Edward Smith was on the same day

May 1829.

State
v.
Belton Pleas.

appointed his assignee according to the requirements of the act of the Legislature on that subject.

Upon the motion to amerce, the sheriff it was proved or admitted that he had received the money upon the execution as aforesaid, and that he had paid the costs to the attorney of the plaintiff.

The counsel for the said sheriff offered in evidence the record of the proceedings in insolvency in the case of the said Mason S. Gibbon, together with the assignment aforesaid as an insolvent debtor, dated 16th June 1827, as aforesaid, and also offered in evidence a certain book of said Edward Smith, as assignee of said Gibbons, an insolvent debtor, as aforesaid, to prove that he had charged himself as such assignee with the amount of moneys collected on the aforesaid execution by him as sheriff as aforesaid, of the said Jonathan Belton. To the above evidence the counsel for the party interested under the said judgment objected, and the Court of Common Pleas sustained the objection, overruled the above evidence, and rendered judgment of amercement as aforesaid.

It was not proved, upon the notice of amercement, that the said Edward Smith had notice of the assignment of the said note to Brooks, and by him to Miller and Cooper.

If upon the whole case, the Supreme Court shall be of opinion that the amercement was legally ordered, then it is agreed that the judgment of amercement shall be affirmed with costs. But if the court shall be of opinion that the judgment of amercement was illegally rendered, then the same shall be vacated and set aside.

R. S. Field, and F. L. McCulloch, for the plaintiff in certiorari.

Richard P. Thompson, and Wm. N. Jeffers, for the defendants.

The Chief Justice delivered the opinion of the court.

The amercement of a sheriff is founded upon his neglect, or refusal, or omission to perform some prescribed duty. By the 22d section of the act concerning sheriffs, *Rev. Laws 241*, it is enacted "That if any sheriff or coroner shall neglect or refuse

May 1829.

State
v.
Salem Pleas.

to execute any writ of execution to him directed, and which hath or shall come to his hands, or where the execution shall be by *fiery facias*, shall neglect to file a just and true inventory of the goods and chattles, lands and tenements, so taken in execution, unless such sheriff or coroner return that he hath levied to the value of the debt or damages and costs; or shall voluntarily or negligently omit, for the space of two months, rendering to the plaintiff or plaintiffs, his, her, or their representative or attorney, the money which he shall have received from the sale of the estate of the defendant or otherwise, he shall be amerced in the value of the debt, or damages, and costs to the use of the said plaintiff or plaintiffs."

In the case before us, the breach of duty charged upon the sheriff is, the omission to pay over the money collected and received by him under an execution; and to establish legally this charge, it must have been shewn that he voluntarily or negligently omitted to render the same to the plaintiff or his representative or attorney. Before an amercement can be ordered, ten day's notice in writing of the motion is required to be given to the sheriff, for the two-fold purpose of enabling him to prepare to resist it, if undeserved, or to prevent it, by making payment. The facts of the case as presented to us by the statement of the parties, are these: Mason S. Gibbons instituted a suit in the Common Pleas of Salem, by process returnable to March term 1827, upon a promissory note; on which suit judgment was obtained at the ensuing term of September. After the commencement of the suit, Gibbons assigned on the 16th of February 1827 all his interest in the note to James Brooks, and he on the 15th of June of the same year, assigned all his interest in the same to Daniel L. Miller and John Cooper. The suit was prosecuted for the use of Miller and Cooper, but the name of Gibbons was used throughout the proceedings; and neither the assignment nor the interest of Miller and Cooper was mentioned on any one of them, nor upon the execution which was issued on the judgment and delivered to the sheriff. No proof was made before the Court of Common Pleas, on the application for amercement, that the sheriff ever knew, or had received notice of the assignment to Brooks, or to Miller and Cooper, nor does it appear by the state of the case that any demand of payment of the sheriff was ever made by either of them. Mason S.

May 1880.

State
v.
Smith Bros.

Gibbons was discharged as an insolvent debtor, agreeably to the act of the legislature, on the 16th of June 1827, and an assignment was then made by him of all his estate, real and personal to Edward Smith, the sheriff. In the notice of amercement the name of Mason S. Gibbons was used, and no mention was made in or on it of Miller and Cooper.

In all these facts there is no ground work for an amercement of the sheriff. There is no foundation to sustain the charge that he voluntarily or negligently omitted to render the money to the person entitled to receive it. Was there a culpable omission to render it to Miller and Cooper? Clearly not. Their title to claim it was not stated on the record or the execution, as already mentioned, nor in any wise notified to the sheriff. Why then should he have paid to them rather than to any other member of the community? Nothing appears to have given reason to the sheriff to doubt that the interest in the suit and note passed to him by the assignment of Gibbons, and that the money when collected was subject to immediate appropriation for the benefit of his creditors. I do not mean to say it actually did so pass, nor to question or deny the validity of the assignment to Miller and Cooper, or their right to the money. On these points I express no opinion. For if it be conceded, that on the application for amercement they proved an incontestable title to the proceeds of the execution, that proof alone did not justify the amercement; for they were bound to shew further that the sheriff had previously to the service of the notice of amercement *voluntarily or negligently* omitted to render them the money. Without the latter fact the amercement was not legally ordered. Courts will, as was correctly remarked by the counsel of the defendants in *certiorari*, take notice of and protect the rights of assignees; but they must be such as are open and avowed, not such as are latent or concealed.

Much of the scope of the argument of the defendants in *certiorari*, was to shew that Miller and Cooper were entitled to the money; I repeat therefore, that in deciding this case, I wish to be distinctly understood as expressing no opinion which of the parties, Miller and Cooper, or the assignee of Gibbons is entitled to the money collected under the execution. That matter may be the subject of future litigation, and as its determination is not required to arrive at a proper conclusion here, it ought to

be left open. It is enough on the present occasion that the charge of wilful or negligent omission to render the money to Miller and Cooper was not sustained; and the amendment was therefore erroneously ordered.

May 1892.

Inhabitants
v.
String.

THE INHABITANTS OF THE TOWNSHIP OF UPPER ALLOWAYS
CREEK IN THE COUNTY OF SALEM against DAVID STRING
AND OTHERS.

The misnomer of a corporation in a grant or obligation, does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument, be shown by proper and apt averments and proof.

JEFFERS in support of the demurrer cited and relied on the following cases. 1 *Penn.* 115 ; 2 *Strange* 789 ; 2 *Lord Raym.* 1515 ; *Cowp.* 26 ; *Rev. Laws* 724, sect. 3.

Eakin for the plaintiffs cited and commented on the following cases. 2 *Bac. abr.* 8, *Corp. C.* 3 ; 5 *Ibid* 431, *pleas and pleadings* ; *Dyer* 279 ; *Leon.* 322 ; *Moor* 897 ; *Cro. Jac.* 261, 558 ; *Lutw.* 294 ; 4 *Bac. abr.* 753, *Misnomer* ; *Roll. Abr.* 146 ; 2 *Bac. abr.* 5. n. a ; 11 *Co.* 21 ; *Salk.* 7, pl. 17 ; *Com. Rep.* 408. *Com. Dig. Estoppel B.* 271 ; *Cro. Eliz.* 352 ; 700 ; 2 *Bl. Com.* 295 ; 2 *Starkie* 27 ; *Chitty on Bills* 83 ; 6 *Taunt.* 325 ; 4 *T. R.* 28 ; 1 *Starkie* 85 ; 2 *Com. Dig. Capacity B.* 4, 5 ; 10 *Co.* 124 ; 3 *Bac. abr. Grants* 378, C ; 1 *Bl. com.* 475 ; *Penn.* 500 ; *Com. Dig. Grants A.* 2 ; *Hobart* 124 ; *Poph.* 59 ; 7 *Taunt.* 546 ; *Dyer* 106 ; 11 *Co.* 21 ; 3 *Com. Dig. Devise, J.* ; 3 *Leon* 18 ; *Bro. Corp.* 8, 62 ; *Andr.* 117 ; *Mos.* 865 ; *Co. Lit.* 3, a ; 6 *Co.* 65.

EWING, C. J. The declaration in this case alleges the bond, on which the action is brought, to have been made by the defendants to "The inhabitants of the township of Upper Alloway's Creek in the county of Salem, by the name and description of The taxable inhabitants of township of Upper Alloway's Creek in the county of Salem and State of New-Jersey," and contains

May 1829.

Inhabitants
v.
String.

an averment in the following words ; " And the said the inhabitants of the township of Alloway's Creek in the county of Salem, do aver and say that they are one and the same body politic and corporate as is described and mentioned in the said writing obligatory and no other."

To this declaration there is a general demurrer ; and the defendants rely on the variance between the name in the bond and the true name of incorporation.

The misnomer of a corporation in a grant or obligation does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument, be shewn by proper and apt averments and proof. " There will be found a difference," says *Lord Coke*, 10 *Rep.* 125, " between writs and grants, for if a writ abates, one might of common right have a new writ, but he cannot of common right have a new bond or a new lease." Hence the law has benignly provided, *ut res magis valeat quam pereat*, that the mistake shall not vitiate the obligation or grant, but impose on the corporation truly designed the necessity of averring and proving the real intention of the parties. In the present case the averment, if sufficient, is admitted by the demurrer to be true ; and it is sufficient, for there is no such substantial difference between the name used and the true name, there is no such irreconcilable incongruity between them, as to render it impossible for the plaintiffs under the plea of the general issue to prove the matter contained in the averment.

The cases in the books fully evince and establish the doctrine I have stated.

In the case of *Lynne Regis*, 10 *Coke* 122, the special verdict found that the defendant's testator made, sealed and as his deed, delivered, the writing obligatory to the plaintiffs, the Mayor and Burgesses of the borough of the lord the king of Lynne Regis, commonly called Kings Lynne in the county of Norfolk, by the name of the Mayor and Burgesses of Kings Lynne in the county of Norfolk ; and judgment was given for the plaintiffs. In the case of the *Abbot of York*, cited 10 *Co.* 125, the Abbot of York was incorporated by this name, " The Abbot of the Monastery of the blessed Mary of York," and a bond was made to the Abbot by this name—" The Abbot of the Monastery of the blessed Mary without the walls of the city of York." The Ab-

May 1829.

Inhabitants

v.
Suing.

bot brought his action of debt by his true name, and in his declaration he said that the bond was made to the plaintiff, by the name, &c. which says *Lord Coke* implies an averment, that the abbey was within York; and the writ was awarded a good writ, by the opinion of the whole court; and yet the name in the bond doth not import, of itself, the true name of the corporation without averment dehors.

In *Medway Cotton Manufactory v. Adams*, 10 *Mass.* 360, the declaration, on a promissory note, alleged that the defendants promised the said *Medway Cotton Manufactory*, by the name of *Richardson, Metcalf and Co.* to pay them &c. On demurrer the declaration was held good, and judgment was given for the plaintiffs. The court said, the declaration was not liable to the objections, which had been made against it, if the case there stated, was proveable in any course of evidence competent for the plaintiffs to produce in a trial upon the general issue. For then the variance of name was not fatal to their demand.

In the *African Society v. Varick* 13, *John* 38, the suit was brought by the name of "The New-York African Society for Mutual Relief," the declaration stated that the defendants acknowledged themselves to be held and firmly bound to the plaintiffs by the description of "The Standing Committee of the New-York African Society for Mutual Relief" in the sum of &c. to be paid &c. On general demurrer, judgment was given for the plaintiffs. The court said, "where a deed is made to a corporation by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them by the name mentioned in the deed. The allegation in the declaration that the defendants acknowledged themselves to be bound unto the plaintiffs by the description, &c. is equivalent to such an averment." This case meets one of the difficulties urged by the counsel of the defendants, that the bond being made to the taxable inhabitants is made to part only of the persons included in the corporation, and that therefore the averment cannot be sufficient.

In the *President &c. v. Myers*, 6 *Serg. and Rawle* 12, the declaration set forth a covenant with "The President Managers and Company of the Berks and Dauphin Turnpike road," and the article produced on the trial, contained a covenant with "The Berks and Dauphin Turnpike Company." *Gibson, Justice*, in

May 1829.

Inhabitants

v.
String.

delivering the opinion of the court, said, "In pleading, the style or corporate name must be strictly used, and while the law was that a corporation could speak only by its seal, the same strictness in the use of the style was also necessary in contracting. But when the courts began to allow these artificial beings, most, if not all, the attributes of natural existence, and to permit them to contract pretty much in the ordinary manner of natural persons, a correspondent relaxation in the use of the exact corporate name, for the purposes of designation necessarily followed. I take the law of the present day to be, that a departure from the strict style of the corporation, will not avoid its contracts if it substantially appear that the particular corporation was intended, and that a latent ambiguity may under proper averments be explained by parol evidence, in this as in other cases, to shew the intention."

In *Woolwich v. Forrest* and others, *Penn.* 115, the suit was brought in the name of "The Inhabitants of the Township of Woolwich in the county of Gloucester" and the bond was made to "The Inhabitants of the township of Woolwich" which this court held would have been sufficient if there had been an averment in the declaration, that the person or corporation described in the grant is the same with that named in the writ.

In *The Inhabitants of the township of Middletown in the county of Monmouth v. McCormick*, *Penn.* 500, the declaration set out a bond to the plaintiffs by the name and description of "The Inhabitants of Middletown aforesaid, in their corporate capacity" and contained an averment that the plaintiffs were the same body politic and corporate as described in the bond. On general demurrer, judgment was given for the plaintiffs. The Chief Justice said, "When a corporation appears in court in its proper corporate name, and declares upon a bond in which there is a variance from that name, it must be averred in some form or other, that the corporation suing, and the corporation named in the bond is one and the same corporation."

On the part of the defendants it is insisted that no averment can sustain the bond in question, because it was taken from the collector of taxes of a township under the third section of the supplement to the act concerning townships, *Rev. Laws* 724, which requires that such bond shall be taken in the corporate name of the township.

It might suffice to say that inasmuch as there is no oyer of the bond in the present case, the condition is not upon the pleadings, and we cannot therefore judicially see that it was given by a tax collector. But if for argument's sake we suppose it so to be, it is manifest that the conclusion deduced from the direction in the act, that it shall be taken in the corporate name, is unsound; for the requisition of the act is really nothing more than the general rule, that all bonds given to corporations should be given in the corporate name; and hence a variance in this case can operate no more, nor be less remediable, than in ordinary cases. Moreover as the act requires such a bond to be taken in name of the corporation, if the bond in question be a collector's bond, a presumption, in support of the averment, arises that it was really designed to be given to the plaintiffs, and that the parties by the name and description in the bond really intended, the corporation now the plaintiffs. It may be farther observed that the act under which the constable's bonds were taken in the cases of *Woodwick* and *Middletown*, directs them to be entered into "to the inhabitants of the township in their corporate name and capacity." *Patt. 828, sect. 52.*

May 1829.

Inhabitants
v.
String.

We are of opinion the demurrer is not well taken, and should be overruled, and judgment rendered for the plaintiffs, with leave to the defendants, if they choose, to withdraw the demurrer and plead, &c.

Judgment accordingly.

May 1829.

Coxe
v.
Gulick.SARAH COXE *against* HENRY GULICK.

In an action of dower the defendant may plead in abatement that the husband of the demandant was an alien.

The plea of alienage ought to contain a direct averment that the person is an alien, and that he was born out of the allegiance of the state, and within the allegiance of a foreign state.

Alienism will not be inferred simply from the facts that a person was on the 3d of July 1776, a subject of Great-Britain; and in the year 1777 withdrew from this state and took refuge with the British army, and died in England, and never took upon himself the oath of allegiance to this state or the United States, but elected to continue a subject of the king of Great-Britain.

A demurrer admits all such facts as are sufficiently pleaded, but is no admission of such as are not sufficiently pleaded.

THIS was an action of dower brought by Sarah Coxe, widow of Daniel Coxe, deceased, for her dower in certain premises owned by the defendant. To the ordinary count in dower, the defendant pleaded in abatement, "That heretofore to wit, on the third day of July, in the year of our Lord one thousand seven hundred and seventy-six, to wit, at Trenton, in the said county of Hamterdon, the said Daniel Coxe, in the said count mentioned, was a subject of the king of Great Britain, and that afterwards to wit, in the year of our Lord one thousand seven hundred and seventy-seven, he the said Daniel Coxe, did withdraw from and out of the state of New-Jersey, and that the said Daniel Coxe, at the time of his decease, did reside under the actual jurisdiction and government of the said king of Great-Britain, to wit, in England, in the said Kingdom of Great-Britain, and that he the said Daniel Coxe, did never take an oath of allegiance to the State of New-Jersey, or to the United States, or either of them; nor did the said Daniel Coxe, ever take an oath of abjuration of the king of Great-Britain, nor did the said Daniel Coxe at any time, in any overt act by him done, exhibit himself as, or profess himself to be, a citizen of the State of New-Jersey, or of the United States or either of them; but the said Daniel Coxe did choose and elect to remain and continue a subject of the said king of Great-Britain. And this he is ready to verify. Whereupon he prays judgment of the said count and that the same may be quashed."

Wall, for the demandant, cited and relied upon the following authorities, 1 *Chit. Plea*, 215; 2 *ib.* 473; 2 *Granch* 283; 4 *ib.*

211 ; 3 *John. Ca.* 107 ; 2 *ib.* 28 ; 3 *ib.* 27 ; 2 *Penn. Rep.* 764 ;
Rev. Laws 263, sec. 75 ; 5 *Halst. Rep.* 46 ; *Rev. Laws* 397 ;
Story Plead. 11 ; 8 *T. Rep.* 166.

May 1829.

Cox
 Gullick.

W. Halsted and *Vroom* for the defendant, cited and relied upon the following cases. 9 *Mass. Rep.* 363 ; 11 *ib.* 119, 313 ; 12 *ib.* 8 ; 10 *John. Rep.* 183 ; 11 *ib.* 418 ; 20 *ib.* 323 ; 3 *Bin. Rep.* 8 ; 2 *Kent Com.* 34, 35 ; 4 *Cranch* 321 ; *Wheat.* 535 ; 2 *Pick. Rep.* 394, 5 note ; 2 *Mass. Rep.* 244 ; 1 *Wheat.* 300 ; 4 *Il.* 453.

The Chief Justice being the guardian of certain infants against whom were actions, by the same plaintiff, and depending upon the same points, took no part and delivered no opinion.

FORD, Justice, delivered the opinion of the court.

Sarah Coxe, widow of Daniel Coxe, dec. demands the third part of certain lands for dower of the endowment of her said late husband ; and her demand is opposed by a plea in abatement setting out the following facts ; 1st. That the said Daniel Coxe, on the 3d day of July 1776, was a subject of the king of Great-Britain ; 2d. That afterwards in the year 1777, he withdrew from this state ; 3d. That at the time of his decease, he resided under the jurisdiction of the King ; 4th. That he never took the oath of allegiance to this state, or the United States, or any of them, nor the oath of abjuration ; 5th. Nor did he by any overt act exhibit himself as, or profess himself to be, a citizen of this state ; 6th. But that he chose and elected to continue and remain a subject of the king of Great-Britain. To this plea there is a general demurrer.

First. If these facts amount to a plea that the husband was an alien, they shew matter of disability which is clearly pleadable in abatement. *Com. Dig. Abatement, E. 4* ; 9 *Mass.* 363, *Small v. Lee.*

Secondly. A demurrer admits all such facts, as are sufficiently pleaded, to be true. *Bac. Ab. Pleas, N. 3* ; but is no admission of such as are not sufficiently pleaded. Now, no facts whatever, will constitute a person an alien without an averment that he is one. The court is required to infer from the facts in the plea,

May 1829.

Cox
v.
Gulick.

that the husband was an alien when the plea itself does not call him so, but seems carefully to avoid doing it. In this respect, it departs from the established form of pleading this defence. In proof of this, I shall simply refer to 2 *Chitty* 473, as among the latest and best authors, and as one who never departs from *Rastall*, *Lilly* and *Wentworth*, who preceded him in the collection of common law entries. The plea, according to him and all other authors, ought to commence with a direct averment that the person is an alien, and then that he was born out of the allegiance of the king or state, and within the allegiance of a foreign state. In *Calvin's case*, 7 *Rep.* 16, b. the most usual and best mode of pleading, was adjudged to be both exclusive and inclusive *extra ligeantiam regis et infra ligeantiam alterius regis*. Yet the two facts, that he was born [for example] out of the allegiance of the king of England and within the allegiance of another king, do not of themselves constitute him an alien, for he might still be a liege subject by act of parliament, therefore, the bar is incomplete, unless it avers him to be an alien. It was said in argument to be characteristic of a good plea, that it states all the facts and leaves the law arising on them to the court; the remark is a sound one; but here the court is required to infer, from the facts stated, another which is not stated, to wit, that he is an alien, before they can decide whether the writ is to be quashed or not; that is, they are to add to the plea a very important fact and then declare the law arising on it. The reason given for omitting this important fact is the peculiar circumstances of the case, as if they were any more so than those in *Calvin's case*, who was nevertheless averred to be an alien.

But alienism could not be inferred from the facts stated in the plea, supposing them all to be true. He was on the 3d of July 1776, a subject of the king of Great-Britain; so was Hancock and Adams; so was General Washington and the band of patriots that composed his army, and must we gainsay their citizenship and declare them *aliens* to their country? Again, Daniel Coxe, in the year 1777, withdrew from this state; so did also a great many other Americans take refuge with the British army and were called refugees; but they were declared by all our statutes to owe allegiance to the state; they were declared to be citizens; were warned of their duty as citizens; and punished in their property as citizens; and we cannot call them

aliens even at this day without flying in the face of all our laws. But in the next place he *died* in England ; now, if an American citizen happens to die in Europe does that constitute him an *alien*, so that his wife cannot be endowed nor his children inherit his estate ? A citizen carries his allegiance with him to every part of the world, and though he may die abroad he does not become thereby an alien. Again, the plea says, that he never took the oath of allegiance to this state, or the United States, or any of them ; but does an omission of this duty destroy citizenship ? Then what multitudes of our citizens have become aliens and lost the power of transmitting their lands to their children. But he never professed himself to be a citizen ; true ; nor does allegiance depend at all on so doing so. Lastly. The plea says, that he elected to continue and remain a subject of the king. Now, our laws do not submit this matter to his choice ; they do not permit a man to lay aside his allegiance as he puts off a garment, otherwise he might appear in arms against his country without being guilty of treason. Thus no fact set forth in the plea authorises an inference that the husband was an alien. It is said not to appear that he was born in the United States ; but the court holds every suitor to be a citizen unless the contrary is shewn ; if the place of birth was material to constitute him an alien, the party relying on alienism should have shewn it in the plea.

Perhaps an apology is due for saying as much as has been said on the manifest defects of this plea ; and if so it must be found in the apparent sincerity, and strenuousness with which it was endeavored to be maintained at the bar.

Let the defendants answer over to the court.

JACOB C. MORRIS *ads.* HENRY GEIGER.

Notice must be given, of an application to discharge a defendant on common bail.

THE defendant Geiger, had been held to bail for a debt due the plaintiff.

May 1839,

Morris
v.
Geiger.

May 1829.

Ackerman

v.
Van Houten.

Morris on the part of the defendant moved the court to discharge him on common bail, because he had since the commencement of the suit taken the benefit of the insolvent law.

The *Chief Justice* asked, if any notice of the motion had been given to the plaintiff's attorney.

Morris said that none had been given, because he supposed none was necessary, and cited the case of *Ogden* ads. *Hughes*

The court refused to hear the motion because notice of the application had not been given to the plaintiff's attorney.

EXECUTORS OF ACKERMAN *ads.* C. A. VAN HOUTEN.

If a defendant neglects to plead his discharge, under the insolvent act, in an action for a debt contracted previous to his discharge, and suffers the regular time for pleading the same, to elapse under a mistaken idea of the law, the court will not permit him afterwards to withdraw a *relucta* given by him at the Circuit in order to plead his discharge.

WM. HALSTED, on behalf of *W. Pennington*, attorney for Van Houten, moved for leave to withdraw the *relucta* which had been signed at the last Circuit in *Essex*, for the purpose of pleading the discharge of Van Houten, under the insolvent act, previous to the commencement of the suit; and read an affidavit of the defendant, stating, that subsequent to the contracting of the debt, for which the action was brought, and previous to the commencement of the suit, he took the benefit of the insolvent law of this state, and that he did not inform his attorney of that fact, (until after he had filed a plea of the general issue, and the cause had been noticed for trial and called at the circuit,) under a belief that it would be sufficient for him to produce his discharge before the Circuit Court in order to obtain the benefit of it.

E. Vanarsdale, jun. opposed the application upon the ground that it was too late in point of time; and cited 2 *N. Y. T. Rep.* 102; 1 *John. Ca.* 133; 18 *John.* 337.

CH. JUSTICE. We think this application too late. The discharge was allowed before the commencement of the suit, and might have been pleaded, and probably would have been if not concealed, it would almost seem studiously from the attorney by the defendant who availed himself of another plea, which had no support and was relinquished at the Circuit. Allowing to the affidavit its utmost force, the only reason given for the delay, is an ignorance of the law.

May 1829.

Tenbrook
v.
M'Colm.

Application Overruled.

JOHN D. W. TENBROOK, GUARDIAN, against HENRY M'COLM AND WIFE.

An appeal will not lie, to the Prerogative Court, from a decree of the Orphans' Court, revoking letters of guardianship. The proper method of reviewing such a decree is by writ of *certiorari*.

J. S. Green for plaintiff.

Vroom for defendants.

EWING, C. J. We are moved in this case to quash a writ of *certiorari*, which has brought here a decree of the Orphans' Court of the county of Somerset, revoking, so far as related to the person of the ward, letters of guardianship of the person and estate of David Voorhees, granted by that court in the year 1819; because, as stated by the court in their decree, "the custody of the person of the said infant had until lately been committed by the said guardian to the mother of the said infant, and the said mother was desirous of retaining the possession of the person of the said infant, and had always treated him with the kindness and affection of a mother, and was together with her present husband, Henry M'Colm, perfectly competent to the proper bringing up of the said infant, and the said John D. W. Tenbrook, the guardian, had without any good or proper cause shewn, taken the said ward from his mother, and refused to restore him."

The ground on which the motion is rested, is, that a writ of *certiorari* will not lie, to remove here such decree of revocation, and that an appeal should have been taken to the Prerogative Court.

May 1829.

Tenbrook
v.
McColm.

In the 33d section of the act respecting the Prerogative and Orphans' Courts, *Rev. Laws* 787, it is enacted that "all final sentences or decrees of the Orphans' Courts in the several counties of this state, where no appeal is given to the Prerogative Court, shall be subject to removal by *certiorari*, into the Supreme Court." Hence it is seen that our topic of inquiry is, whether an appeal from the present decree is *given*, inasmuch as if not given, a *certiorari* may, by the express terms of the act, be sued out.

The Prerogative Court and the Orphans' Court, are tribunals created by statute; and their jurisdiction, so far at least as respects the subjects of it, is special and limited. We are then to look into the statute to learn their jurisdiction, and, especially in consequence of the phraseology of the section just cited, to ascertain whether in any specified case an appeal is given.

The first section declares that "the authority of the Ordinary shall extend only to the granting of probates of wills, letters of administration, letters of guardianship, and to the hearing, and finally determining of all disputes that may arise thereon." The second section directs him to hold a Prerogative Court at stated times, "when he shall hear and finally determine all causes that shall come before him, either directly, or by appeal from any of his surrogates, or the Orphans' Court." The 6th section, declaring the jurisdiction of the Orphans' Court, gives them "full power and authority to hear and determine all disputes and controversies whatsoever, respecting the existence of wills, the fairness of inventories, the right of administration and guardianship, and the allowance of the accounts of executors, administrators, guardians, or trustees, audited and stated by the surrogate, and all other matters and things hereinafter submitted to their determination." The general terms of these sections have never been supposed or construed to give jurisdiction of appeal from *all* decrees of the Orphans' Court; and among other reasons it may be presumed, because an appeal is not in either section expressly given or recognised; because in the subsequent sections, in some specified cases, the appeal is given in express terms; and because from the language of the whole act, it is abundantly manifest, that the legislature did not design to subject all decrees of the Orphans' Courts to appeal, but to give the appeal from some, and to subject others to removal by *certiorari*. Agree-

May 1829.

Tentbrook
v.
M'Corm.

ably to this view of the matter, it has been held that the decree of the Orphans' Court on the settlement of the accounts of executors or administrators is not subject to appeal, but to removal by *certiorari*, *Sulard v. Smalley*, before Governor Williamson, July 1824; the *State v. Mayhew*, 4 Halst. 75. In *Eldridge v. Lippincott*, Coxe 397; an appeal to the governor from a decree of the Orphans' Court, appointing a guardian, was dismissed for want of jurisdiction; the act of 1784, in force when that case was decided, although containing these same general sections which have been cited, not giving in express terms an appeal from the granting of letters of guardianship.

The 7th section of the act of 1820, *Rev. Laws 777*, authorizes the Orphans' Court, if a guardian has embezzled, wasted or misapplied the estate, or shall neglect or refuse to give further security when required, to revoke or repeal the letters of guardianship; but nothing is said in respect to an appeal from the sentence or decree of revocation. Again, in the 9th section, the Orphans' Court are authorized to revoke letters of guardianship, where, at the instance of a surety in the bond, it is made to appear that the guardian has embezzled, wasted, misapplied or mismanaged the estate; and as in the former section no appeal is, in terms, given.

The 27th section transfers to the Orphans' Courts, "the powers and duties formerly exercised and performed by the Ordinary relative to the admission of guardians," or more correctly speaking gives them concurrent jurisdiction in such cases with the Ordinary. In this section an appeal is expressly given from the Orphans' Court to the Prerogative Court. And it has been strenuously insisted, in the argument at the bar, that under this section, the general power of revocation of guardianship is vested in the Orphans' Courts. I have been disposed to exercise great latitude in the construction of this section and to find here, if possible, the power of revocation, for the sake of the appeal. I am, however, compelled to believe, that the power of revocation of letters of guardianship is not given directly or impliedly by that section. The powers and duties there spoken of are "relative to the admission of guardians." Now the term, admission, is of plain and certain import, and can justly, by no means be made to comprehend a revocation. Moreover, these powers and duties may be exercised in the county where the minor resides,

May 1829.

Tenbroek
v.
M'Colm.

or has real or personal estate ; and if therefore, one of these powers is that of revocation, the very unsafe and inadmissible conclusion follows, that the letters of guardianship may be granted in one county and the revocation take place in another ; for after the admission, the ward may remove to and reside in another county or may have there real or personal estate. If then the power of revocation is not comprehended in this section, it is not subjected thereby to the appeal which is provided ; an appeal is not thereby given.

On the argument at the bar, it was earnestly insisted and forcibly argued, that the Orphans' Court have a general jurisdiction to revoke letters of guardianship, not confined merely to the cases expressly specified in the act, but embracing all cases where a revocation is legal and proper. For the occasion, without intimating any opinion of the correctness of the position, let it be admitted. The conclusion by no means follows, that because a power to pronounce a decree of revocation exists in the court, such decree is subject to an appeal. If, indeed, this power were derived from the 27th section, the conclusion would be sound. But, if from other parts of the statute, from the language of the general sections, or from inference that as the power is not elsewhere expressly vested, it must be held by the body which has the authority to create or admit the guardian, then the appeal does not necessarily attach ; for we have already seen that all sentences or decrees are not subject to appeal, and such only are, as have the appeal expressly given or attached to them.

In the course of the argument the case of Little's will was mentioned. The surrogate having proceeded to prove the will within ten days from the decease of the testator, an appeal was made to the Prerogative Court, and the letters testamentary were set aside. It may suffice in reference to this case, to remark that all proceedings of surrogates, not brought before the Orphans' Court, are expressly made subject to an appeal to the Prerogative Court. *Rev. Laws 783, sect. 21.*

Inasmuch, then, as I do not any where find in the statute an appeal given from a decree of revocation of letters of guardianship, I am irresistibly led to the conclusion that such decree is subject to removal by *certiorari*.

In the notes to the article "New-Jersey" in *Griffith's Register*, 1198, the opinion of the editor is expressed in the following

May 1829.

Neal
v.
Cook:

manner. After stating the cases in which an appeal may be made he says, "In all the other cases in which a special jurisdiction is given to the Orphans' Court under the act of June 13, 1820, such as decreeing further security to be given by administrators or guardians, or revoking their letters, and on complaint under the 8th, 9th and 10th sections, and upon the 12th, 13th, 19th and 20th relative to the division and sale of lands; and upon the 30th respecting the final allowance of accounts; in all these instances being in no wise the subject of the Ordinary's jurisdiction, as defined by the statute, nor any appeal given to him, the remedy after final sentence or decree of the Orphans' Court, is by *certiorari* out of the Supreme Court." I make no apology, here, for this citation. Abroad, this work is referred to with confidence, and at home the known erudition of the editor, and his long experience in the office of surrogate, entitle his opinion, on this subject, to respectful attention.

Finding the *certiorari*, in this case, sustained by the act of the legislature to which, at the outset of my opinion, I have referred, I have not examined how far it may be supported, independent of that act, by the general jurisdiction of this court over inferior tribunals of statutory erection.

The other Justices concurred.

Motion to quash overruled.

AVA NEAL *against* RICHARD COOK.

10	337
59	319

IN ATTACHMENT.

A *scire facias*, against a garnishee in attachment, is defective, if it does not state with precision and certainty, the nature of the property attached. The words "rights and credits" do not sufficiently specify the nature of the property; and an inventory returned with a writ of attachment would be defective, if it did not state with more certainty and precision, what was the nature of the property attached.

An attachment had been issued by a justice of the peace in favour of Richard Cook against William Curtis, an absconding debtor, to which the constable made return that he had attached "the effects, rights, and credits of William Curtis, to the amount of forty-five dollars," and the justice rendered a judgment in favour of Cook against Curtis for \$42.74 debt, and \$1.76 costs.

U U

May 1829.

Neal
v.
Cook.

After the rendition of the judgment against Curtis, Cook sued out a *scire facias*, against Ava Neal, the garnishee, in attachment, reciting that "whereas on the 2d of November 1827, a writ of attachment issued out of the court for the trial of small causes at the suit of Richard Cook, against William Curtis, an absconding debtor, directed to William De Hart, constable; and, whereas, the said constable hath returned to our said court, that he had attached the rights and credits of William Curtis, in the hands of Ava Neal, to the amount of forty-five dollars, "and, commanding the constable to summons the said Ava Neal, to appear before the justice, at a certain time and place, to shew cause why the said Richard Cook should not have execution of the said sum of forty-four dollars and seventy-four cents, due from the said Ava Neal, at the time of executing the said writ of attachment." This *scire facias* was duly served upon Ava Neal, the garnishee, and upon the return thereof the plaintiff appeared, but the defendant, Neal, did not appear, and the justice after examining De Hart, the constable, rendered a judgment against Neal as garnishee for \$44.50 debt, and \$1.25 costs; Neal thereupon brought this *Certiorari*, and by his counsel.

J. W. Miller, relied upon several reasons for the reversal of the judgment, and among others, because the *scire facias* and the inventory and appraisement returned by constable, with the writ of attachment, were insufficient.

Vroom, contra.

EWING, C. J. The *scire facias* issued in this case against Ava Neal, as garnishee, is essentially defective in not stating with sufficient certainty and precision, the nature of the property attached. As the garnishee may have occasion to avail himself of the recovery against him, for protection in case of a subsequent demand or suit by the defendant in attachment, the nature of the property attached in his hands ought to be shewn with such precision as to afford him adequate means of protection, to enable him to plead and prove the proceedings under the attachment as a bar to another demand. The recital in the *scire facias* is that the constable had "attached the rights and credits of William Curtis, in the hands of Ava Neal, to the amount of forty-five dollars." No state of demand having been filed on the return of the

May 1820.

Neal
v.
Cook.

scire facias, no greater certainty is shewn. The expression "rights and credits" is of the most general character; and from it, the nature of the right, or credit, or property attached, cannot be learned. If the object attached was a debt or sum of money, due from Neal to Curtis, although the kind of evidence, whether note or bond, which was held by the defendant in attachment, might be unknown, and could not therefore be stated, yet that the object was a debt, might be as well understood and distinctly set forth, as that there was any thing in the hands of the garnishee which could be made liable to the attachment. If it be said, the recital in the *scire facias*, is as explicit as the inventory returned with the attachment; the fact being so, shews that the inventory itself was defective, and that nothing is to be found in any other part of the proceedings to supply the defect of the *scire facias*.

The other justices concurred.

Judgment reversed.

May 1829.

Scudder
v.
Coryell.

JOHN SCUDDER *against* JOHN H. SCUDDER.
SAME *against* J. H. SCUDDER AND J. W. CORYELL.
JOHN CORYELL *against* JOHN W. CORYELL.
SAME *against* J. H. SCUDDER AND J. W. CORYELL.

10	340
51e	165
10	340
55e	442
10	340
70	151

A judgment entered by confession, upon a bond with warrant of attorney, under the act of 24th February 1820, (*Rev. Laws* 685) will not be set aside, upon the application of a subsequent judgment creditor, though the copy of the bond and warrant of attorney upon which the judgment was entered, was made upon two half sheets of paper, and not upon a whole sheet.

Nor will it be set aside, because the copy of the bond and warrant of attorney, at the end of which the judgment is entered, contains erasures and obliterations.

Nor because the affidavit of the plaintiff (required by the act) states that a payment was made by him of a less sum to take up a note of the defendant for a larger sum, without stating in what manner the residue of the note was paid.

Nor because the affidavit stated "that the debt for which the judgment was confessed was justly due and owing to the plaintiff," without setting forth from, or by whom it was owing.

Nor because the affidavit states that the money, for which the bond was given, was lent to the defendant seven years before the date of the bond.

Nor because the affidavit is in general terms and does not affix any sums or dates to the various items stated in it as composing the consideration of the bond.

Nor because the day of the month is omitted in the *jurat* of the affidavit.

Nor because the officer before whom the affidavit was taken, annexed to his name the letters J. P. only and not the style of his office, in words at length.

Nor because the affidavit was entitled against two persons as partners, and the judgment entered against them generally.

Nor because, the affidavit did not state in terms, that the notes which formed a part of the consideration for which the bond was given were paid, "but only that they were satisfied to the holder, and taken up by the plaintiff."

Nor because the affidavit was made on the 6th of November, and the bond did not become due until the 7th of the same month. The words "due and owing" made use of in the statute, mean a simple indebtedness, without reference to the time of payment.

Where fraud or want of consideration is alleged against a judgment entered by confession on bond with warrant of attorney, the court may order a feigned issue.

HARRISON and *Armstrong*, on behalf of Worley and Welsh, subsequent judgment creditors, applied to set aside several judgments which had been entered by confession on bonds and warrants of attorney against Scudder and Coryell.

Hamilton and *Saxton*, opposed the application.

EWING, C. J. Worley and Welsh, subsequent judgment creditors of the defendants, John H. Scudder and John W. Coryell, move to set aside certain judgments entered up in favor of John Coryell and John Scudder, and rely on 1st. departures from the directions of the act in entering up the judgments; 2d. defects

in the affidavits accompanying them; and 3d. want of consideration and fraud in the bonds.

May 1829.

Scudder
v.
Coryell.

Under the first head, it is objected, that the copy of the bond and warrant of attorney is not made as required by the statute on a *whole* sheet of paper; and if by, *whole*, is to be understood, *entire* or undivided, then the objection is true in point of fact. And so it would be if any portion, however small, of the original sheet, had been taken off, although the residue remained unseparated. The copy is placed on two half sheets. But if the term, *whole*, has allusion to quantity, the statute is literally complied with; for as long as the whole shall be equal to all its parts, if all the parts, though a thousand in number, be present, the whole is there.

Again, the copy is said not to be, what the statute requires "a fair copy," for there are many erasures or obliterations. In making the copy, a printed blank, to save labor or for some other motive of convenience, has been used, and where superfluous or different words were found they have been obliterated. If the term *fair* means legible, the statute has been pursued, for the copy is easily read. If *fair* stands for free from spots or blemishes, these are there, although in such sort as by no means to impede the ready perusal, or to render difficult the correct understanding, of the instrument.

The legislature, in directing the judgment to be entered, at the end of a fair copy of the bond and warrant, made on a whole sheet of paper for the purpose, designed merely to give useful instructions, but in no wise to prescribe conditions on which the validity of the judgment should depend. One purpose of the statute was to diminish and simplify forms, so that professional aid might be dispensed with; and we cannot therefore readily believe they have so raised immaterial and unessential forms as to effect the vitality of the judgment.

Let us pursue somewhat further this rule of strict literal criticism, and examine its consequences; for if applied to one clause or provision, by parity of reasoning, so it must be to every other of the statute. "It shall be lawful for the obligee, his executors, administrators or assigns to apply to any one of the justices." But in many, perhaps most cases, some attorney at law, and not the obligee, makes the application, and produces the bond and warrant of attorney. Are all such judgments liable to

May 1829.

Scudder
v
Coryell.

be set aside? The second section directs that the copy of the bond and warrant, and the entry of the judgment be delivered by the plaintiff, or person applying for the judgment, to the clerk of the court. If it be sent by some other person, or transmitted by mail, is the judgment in jeopardy? The objections in question cannot, upon any sound legal principles, prevail against these judgments, especially in favor of third persons whose rights however they may be effected by substantial errors or by fraud, can in no wise be diminished, because the copy is made on an half sheet, or on two half sheets, instead of an whole sheet; or because there are numerous blots on the copy, or he who made it was not an adept in calligraphy.

In examining the objections made to the affidavits, it will be necessary to view them separately and in reference to their contents alone. "In the case of John Scudder, John H. Scudder, and John W. Coryell, it is alleged 1. That the affidavit does not shew a debt or demand against the firm, or perhaps more properly speaking, against both defendants. The affidavit states the consideration of the bond to be "for \$450 cash paid by the deponent to The Trenton Banking Company, to take up a note of five hundred dollars, drawn by John H. Scudder, and endorsed by the deponent for so much money borrowed of the said T. B. Co. for the use of the said John H. Scudder and John W. Coryell, partners trading under the name, style, and firm of John H. Scudder and Company, and the lawful interest on the said sum so paid by the deponent." According to this affidavit then, a sum of money was borrowed for the use of both defendants, and afterwards actually paid for their use to the bank by the deponent, who became liable for it as surety; and although the note on which the money was received from the bank was drawn by one of the firm, yet a meritorious cause of action accrued to the deponent against both defendants, for whose use it was borrowed and paid. As already remarked in examining the sufficiency of the affidavits, their contents alone are to be viewed. The matters *aliunde* which were laid before us in respect to this note belong to another head of objection:

2d. The second objection to this affidavit is, that it states a payment of \$450 to have been made to take up a note of \$500, - a part only of the amount of the note. But if that sum was paid by the plaintiff, it forms the just amount of his demand, and

in what manner the residue was paid, whether by the defendants or in whatever way, is, for the purpose the legislature had in view, in requiring the affidavit, entirely unimportant.

May 1820.

Scudder
v.
Coryell.

3d. To this affidavit it is objected, in common with some of the others, that it avers the debt for which the judgment is confessed to be justly due and owing to the plaintiff, but does not set forth from or by whom. The affidavit contains what is directed in the section of the statute requiring it. Nothing more than is here expressed is made necessary. The language of the section is almost literally pursued.

To the affidavit in the case of *John Scudder v. John H. Scudder* it is objected, that the demand set forth in it, being for money lent seven years before the date of the bond, was barred by the statute of limitations. Whether barred or kept alive by acknowledgments and promises, does not appear; but even if barred, it would furnish a valid consideration for a promise, and of consequence for a bond. The cases cited to prove that a debt barred by the statute of limitations, cannot claim allowance in case of bankruptcy, have no analogy which can bear on the present question. If this objection has any force, it must be to shew a want of consideration in the bond, and falls therefore under another class of the exceptions which are raised against these judgments.

In the case of *John Coryell v. John H. Scudder and John W. Coryell*, several objections are taken to the affidavit.

1. 'Because it is in general terms, no sums or dates being affixed to the various items stated in it as having composed the demand in consideration of which the bond was given.' A minute detail of sums and dates does not seem required by any thing in the statute, a specification is not prescribed. The practice under the statute has been, I believe universally and I think correctly, to state the consideration in general terms.

2. 'In the *jurat* of the affidavit, the month and year are given, but the day of the month is omitted.' The affidavit refers to the bond bearing date on the third and payable on the fourth of November, then current, and was produced when the judgment was signed on the eighth of the same month, and must therefore have been taken between the two last named days. The statutory directions have been substantially pursued by the making and production of an affidavit; and no sound principle can

May 1829.

Scudder

v.
Coryell.

require us, at the instance of a third person, to defeat the judgment on account of this omission, not affecting any essential part of the proceedings.

3. 'The officer, before whom it was taken, does not set out his style of office.' He subjoins to his name the letters, J. P. The affidavit begins by naming the county "Hunterdon, ss." and the common and known use and appropriation of those letters to signify in proceedings of this kind "justice of the peace" are sufficient to shew, that he thus intended to designate his office, and at least to sustain, in connection with the name of the county in the margin, a presumption that the affidavit was made before a justice of the peace in the county of Hunterdon. The affidavit in the case of *The State v. Hutchinson*, decided at November term 1828, had a name only signed to the jurat, without the slightest description of office. The court in that case adverted to "the accustomed abbreviations," without, it is true, expressing any opinion of their sufficiency. In *Kennet v Jones*, 7 T. R. 451, an affidavit for bail which appeared by the jurat to have been taken before "Thomas Merriman, a commissioner," without saying by what court he was commissioned, and without being entitled "in the King's Bench," or otherwise, was held sufficient; and the court said an indictment for perjury might be framed on it, if the contents were not true. In *Jackson v. Gu-maer*, 2 Cowen 552, the jurat of an affidavit produced in evidence on the trial and purporting to be an affidavit under the statute regulating proceedings upon mortgages, was in the following manner, "sworn before me this 1st day of November 1821, George Dexter, com'r. &c." It was held sufficient by the court, and Talcott, attorney-general said, *arguendo*, "This court have repeatedly decided that the words commissioner, &c. are sufficient to an affidavit in support of a motion." In New-York, there are commissioners to take bail and affidavits, commissioners to perform certain duties of a justice of the Supreme Court, and commissioners to take the acknowledgments of deeds; three distinct offices.

To the affidavit accompanying the other judgment of *John Coryell v. John H. Scudder* and *John W. Coryell*, it is objected,

1. That the affidavit is entitled against them, partners, &c. and the judgment is entered against them generally. The judg-

ment is properly entered, even if they were actual partners at the time of signing it ; or if the debt had been contracted by them as partners ; and the words " partners, &c." in the title of the affidavit may be rejected as surplusage.

May 1829.

Scudder
v.
Coryell.

2. " The affidavit does not shew a debt of the firm." This objection is not supported in point of fact. The notes mentioned in the affidavit were indeed given by John W. Coryell and the deponent ; but it is expressly stated that they were given for money borrowed, at their dates, for the use of the said John H. Scudder and John W. Coryell, partners, and paid to one of them to be applied accordingly, and that they were satisfied and taken up by the deponent at *their* instance.

3. " The affidavit does not shew that the notes were paid." It states, however, that they were satisfied to the holder by the deponent, and taken up by him, and in such manner, that the amount of them became due and owing to the deponent ; and thereby a sufficient charge against the defendants is shewn.

4. Another objection to the affidavit is, that it was taken on the 6th of Nov. before the bond became payable, which was on the 7th of the same month ; and as the statute requires the affidavit to set forth, that the debt for which the judgment is confessed, is justly due and owing to the person to whom the judgment is confessed, the affidavit was therefore, it is said, prematurely made. The word " due" has more than one signification or is used on different occasions to express distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment. *Debitum in presenti, solvendum in futuro*. At other times it shews that the day of payment or render has passed. In the former sense it appears to have been used in the statute ; as it is connected with a word of the like signification " due and owing" ; and as the face of the bond would serve to shew whether the day of payment had passed ; and as it is abundantly manifest the purpose of the legislature in the clause referred to, was, not to delay the entry of judgment until after the day of payment, for that had been provided for in an antecedent clause, but to secure fairness, honesty and good faith in the transaction. Moreover, the word *justly* being connected with the word " due" shews the true import of the phrase " justly due." Such appears to have been the opinion of this court, in respect to the use of the words in the case *Warrick v. Mailack*,

X X

May 1829.

Scudder
v.
Coryell.

2 *Halst.* 165. If then the design of the statute in requiring the affidavit, was simply to prevent the entering up of judgments where no indebtedness existed really and in good faith, and to defeat fraudulent purposes, the taking of the affidavit one day before the bond became payable and two days before the signing of the judgment is no such departure, and tends to no such evil, as should vitiate the judgment.

In the several exceptions which I have considered, I do not find sufficient cause to set aside either of the judgments, and more especially as in the 3d section of the statute directing the mode of entering judgments on warrants of attorney, it is enacted that no such judgment shall be reversed for error or misprision of the clerk in entering the same or defect of form in the entry thereof.

In the 3d place, against all these judgments, want of consideration and fraud in the bonds and warrants of attorney, and in the purpose for which they were executed and the judgments were entered up, are alleged; and various matters were urged by the counsel of Worley and Welsh, in support of this allegation. To review them in detail is unnecessary and would be improper in the course of proceeding which in my opinion should be adopted. The court may either decide on these charges or may direct a feigned issue, according to their discretion; and the latter affording a trial by jury is on proper occasions to be preferred. A feigned issue was ordered by this court, in September term 1824, in the case of *Joab Titus v. Moses Burroughs*, at the instance of William Covenhoven, a subsequent judgment creditor.

In my opinion, therefore, the motion to set aside these judgments should be overruled, and if Worley and Welsh think proper to move for the same, a feigned issue should be ordered.

FORD, J. Worley and Welsh obtained judgment against Scudder and Coryell, on verdict for \$1100 in the Supreme Court, in November term 1828; a few days prior to it, Scudder confessed a judgment on bond and warrant to his father; and Scudder and Coryell confessed a joint judgment to him in like manner: at the same time Coryell confessed a judgment to his father in like manner; and Scudder and Coryell confessed in like manner, to him also, a joint judgment. The bonds and warrants bore date only two or three days previous to the confessions and entries. Worley and Welsh now move to set aside these four judg-

May 1829.

Scudder

v.
Coryell.

ments and executions upon two general grounds :—First, that they are entered irregularly, under the act directing the mode of entering such judgments, *Rev. Laws* 685 ; and therefore are absolutely void. Secondly, that they are covinous and fraudulent, and for that reason void, as against Worley and Welsh, who are *bona fide* creditors.

First. Objections are taken to these judgments, because they are not entered in strict conformity to the mode directed by the statute ; that each of them is entered on papers, connected by pins or wafers, and not on a whole sheet, as required by the act ; that there are interlineations and erasures in the copy of each bond, when the act requires a *fair* copy expressly ; that one of the affidavits is without a date ; and instead of being made before a proper officer, the person before whom they are sworn, adds after his name, the initials J. P. which may stand for any other words in the English language, beginning with J. P. as well as the words, justice of peace. But these present no ground for setting aside judgments on the application or interference of third persons, however available they might be on the application of the defendants themselves. The idea that a power of allowing judgment at chambers is a special one, delegated by the provisions of this act to a judge, and that his jurisdiction depends on a strict conformity to the mode therein provided, so that the judgment becomes not merely voidable on a writ of error, but by reason of any departure from such forms and requirements, utterly void for want of jurisdiction, is an idea that cannot be maintained or adopted. The power of entering these judgments at chambers has belonged to judges of courts of common law from almost the earliest period of juridical history to the present time ; and this statute was intended for the regulation of an existing power at the common law, and not for the introduction of a new one. These judgments are not to be considered null and void for want of form under this act, any more than they were for lack of form prior to the passing of this statute ; because there is *no defect of jurisdiction* in either case, but only an irregularity of proceeding. Such exceptions are as available for setting aside the judgment upon a writ of error, at the suit of *the party*, as ever they were ; but as long as it stands unreversed, it must be recognized as a valid judgment, in all proceedings collateral to it, either by third persons or even the parties them-

May 1829.

State
v.
Zule.

selves. No side-way proceeding can set aside the judgment of a court of competent jurisdiction, it can be done by a direct proceeding only; and therefore none can take advantage of these defects in form but the parties themselves, and that for two very obvious reasons, one, that they are injurious to no body else, and another, that none beside a party to the record can have a writ of error. But though courts of justice never allow judgments to be impeached for irregularity or want of form by third persons, yet they allow them to be assailed for *fraud or covin* on the application of *creditors*, and have exercised an equitable power immemorially to inquire into them for these causes, and to set them aside, when such accusations appear to be true. For fraud and covin will vitiate every kind of act, and fraudulent judgments are made as void against creditors, as fraudulent conveyances, under the statute of frauds, *Rev. Laws* 148. This brings under consideration the

Second general ground, namely: That these judgments are fraudulent, and therefore void as respects Worley and Welsh, who are *bona fide* creditors of Scudder and Coryell the defendants. As this gives rise to a very important question of fact, which, will be settled more satisfactorily perhaps by a jury, I think the creditors ought to be left to that course.

Motion to set aside overruled, with leave to move for feigned issues, &c.

THE STATE against WILLIAM ZULE.

If the caption of an indictment do not shew distinctly the names and style of office of the judges composing the court to which it is presented, the indictment will be quashed.

An indictment was presented by the grand jury of the county of Hunterdon, to the Court of Oyer and Terminer and General Goal Delivery of said county, against William Zule, for polygamy, and was removed by *certiorari* into this court. The caption was in the following words: "Hunterdon, to wit, Be it remembered, that at a Court of Oyer and Terminer and General Goal Delivery, holden at Flemington, in and for the county of Hunterdon, on the first Tuesday of May, in the year of

our Lord one thousand eight hundred and twenty-seven, the Honourable George K. Drake, second justice of the Supreme Court of Judicature, George Rea, Dennis Wykoff, Luther Opdycke, and others, their fellows, Judges of the Court of Common Pleas for the said county, according to the form of the statute in such case made and provided, by the oath and affirmation of A. B. &c." [naming them] "good and lawful men of the said county, sworn and affirmed, (those who were affirmed, severally alleging themselves conscientiously scrupulous of taking an oath,) and charged to inquire for the State of New-Jersey, in and for the body of the said county; it is presented in manner and form following, to wit."

May 1829.

 State
v.
Zule.

Scott and Wall, for the defendant, moved to quash the indictment, because the caption was defective, inasmuch as it did not shew that the grand jury were brought *before* any court. It ought to set forth the time and place of the sitting of the court; by whom holden; by what authority; and of what they are authorized to inquire; 2 *South*. 46.

W. Halsted, for the state, contended, 1st. That the caption contained every substantial requisite. That the only defect was the omission of the word *before*, which should have been inserted after the words "twenty-seven." That this was not essential to the validity of the indictment, for this court were bound to take judicial notice, that there could be but one Court of Oyer and Terminer in a county at a time; and they were bound to notice the times at which these courts were holden, and the manner in which they were constituted; consequently, they could not shut their eyes and refuse to notice that there was no other Court of Oyer and Terminer to which a grand jury could make a presentment, except the court composed of the justice of the Supreme Court and the judges of the Common Pleas named in the caption.

2. He contended that if the caption was defective on account of the omission of the word "*before*," that the defect might be amended, and that the court ought to allow the amendment to be made.

EWING, C. J. The caption of this indictment is essentially defective. The books lay down the rule, and they are followed

May 1820.

Griffith
v.
West.

by the most approved precedents, that the names and style of office, of the persons constituting the court to which the indictment is presented, should be set out. The purpose is to shew that they were competent to hold the court, and had power to take the indictment. 2 *Hale C. C.* 166 ; 1 *Chit. Cr. Law* 331. In this caption, names, it is true, are found, but no allegation that the court was held by them, or the indictment presented before them. As was observed by the counsel of the state, the deficiency might perhaps have been supplied by one word, but that important word is wanting.

With respect to amendment, no application for the purpose has been made. If desired by the counsel for the state, an application should have been made before the opening of the argument upon the exception, of the nature of which he had been previously apprized.

Indictment quashed.

PHILIP GRIFFITH *against* GEORGE WEST.

CERTIORARI.

Upon the argument of a *certiorari*, the plaintiff cannot assign as a cause of reversal, a specific reason, not stated among the reasons filed ; unless there is a general reason filed, under which it can be fairly comprehended.

WHITE moved to reverse the judgment for a cause not stated in the reasons filed.

Sloan, for defendant, objected that the reason urged for the reversal was not one of those filed, and that as there was no general reason filed, under which it could be fairly comprehended, to admit the plaintiff now to assign it, as a cause for reversal would be a surprise upon the defendant.

CH. JUSTICE. Under a general reason assigned, the practice has been to allow the plaintiff to insist upon any error apparent on the face of the proceedings, saving the opposite party at all times from prejudice by surprise. In this case there is no general reason assigned ; the reasons are all specific, and as no one covers the error now proposed, we cannot take notice of it.

10	350
86	402

10	350
68	202

CORNELIUS WILLIAMSON *against* CORNELIUS BOORAM.

May 1829.

Williamson

v.

Booram.

CERTIORARI.

An insolvent debtor who has been remanded to prison upon the undertaking of a creditor to prove that he had not fairly delivered up his property to the use of his creditors, and who had joined issue with his creditor upon the fairness of his surrender, according to the form of the pleadings prescribed by the insolvent act, (*Rev. Laws* 219) cannot have a judgment entered in his favour by default of the creditor to appear against him, but must go on and prove his case to the jury and obtain their verdict.

THIS was a *certiorari* to the Court of Common Pleas, of the county of Hunterdon, to remove the proceedings of that court in the matter of the application of Cornelius Booram, an insolvent debtor, for the benefit of the insolvent laws. Upon the hearing of the application, Cornelius Williamson, one of the creditors, not being satisfied with the truth and honesty of the declaration and confession of the insolvent, nor with the truth and fairness of his account and inventory, entered into the usual agreement and stipulation required of the creditor on such occasions. Whereupon the insolvent was remanded to prison, and filed his declaration in the form prescribed by the insolvent act, to which Williamson pleaded, and issue was joined in the usual form. When the cause was called on for trial, Williamson did not appear, because as was alleged the cause was called out of order; and the Court of Common Pleas, instead of ordering the trial to proceed, made the following order, viz. "That judgment by default be entered against the said defendant, (Cornelius Williamson) with costs to be taxed, and that the said plaintiff (Cornelius Booram) be discharged from imprisonment, for all debts by him heretofore contracted." Williamson then brought this *certiorari*, and by his counsel, *P. D. Vroom*, esq. urged several reasons, for the reversal of the judgment, among others, "That a judgment by default was entered against the defendant, after issue joined, on the facts alleged in the pleadings."

BY THE COURT. The statute requires the debtor, when issue is joined to "cause a *venire facias* to issue;" and to "cause the issue joined, as aforesaid, to be tried in turn before the court by the said jury, to be summoned by the sheriff of the county," and on the trial to "prove in evidence, and maintain the truth and

May 1829.

Williamson

v.

Booram.

legality of his case according to the issue on his part joined." In this issue, from the form of the pleadings, the debtor holds the affirmative. The statute further directs, "that if the jury do find a verdict for the debtor, the court do render judgment that the debtor be discharged."

From the provisions of the statute, and the nature of the issue, it is clear that the court erred in entering a default and discharging the debtor without trial or verdict, because the creditor did not appear. The issue joined should have been tried. The debtor should have been required "to prove in evidence and maintain the truth and legality of his case," to have sustained to the satisfaction of a jury the affirmative averment of his declaration. A verdict for the debtor was indispensable, to authorize the court to render a judgment of discharge.

Let the judgment and discharge be reversed.

INDEX

TO THE PRINCIPAL MATTER

OF THE FIFTH VOLUME.

A

ABATEMENT.

1. A plea in abatement, to an indictment for embezzling the money of a bank, "That one of the jurors sworn on the grand jury, was a stockholder in said bank, and possessed a large amount of its promissory notes, and was greatly interested in procuring said indictment," is bad on general demurrer. *State v. Rickey*, 83

2. So, also, a plea in abatement, "That two of the persons sworn as members of the grand jury, had, before they were sworn, formed, and publicly expressed opinions unfavorable and prejudicial to the defendant," is bad on general demurrer. *ib.*

3. An allegation in a plea in abatement, "That certain persons," (naming them) "were sworn and charged as members of the grand jury," is sufficiently certain without stating that they served on the grand jury. *ib.*

4. If a summons issuing out of this court, calls upon the defendants to answer the plaintiff in a plea of trespass, and also a bill to be exhibited against the defendants to the damage of the plaintiff \$8000, and the declaration is in assumpsit, the defendant may craveoyer of the writ and plead in abatement, the variance between the summons and the declaration, and such plea will be good. *Schenck v. Ex'rs. of Schenck*, 274

5. A plea in abatement to a declaration in assumpsit, that another action had been previously commenced by the defendant against the plaintiff, in which the matters mentioned in the declaration might be set off, is good. *Executors of Schenck v. Schenck*, 276

6. In an action against the surviving heirs of an obligor upon a bond of their ancestor, the heirs of a deceased heir having lands by descent should be joined in the action, and if they are not, the non joinder may be pleaded in abatement. *St. Mary's Church v. Wallace*, 311

ACCOUNT.

See STATE OF DEMAND 2.

ACTION.

See DEBT.

TRESPASS.
TROVER.

AFFIDAVIT.

1. The affidavit to shew that a witness lives out of the state, and thereby to obtain a commission for the examination of such witness, need not be taken on notice. *Den v. Wood et al. 5 Halst.* 62

2. An affidavit of the service of a declaration in ejectment, which states that the copy was served "upon A. B. said to be one of the directors of the within named company" is insufficient. *Den v. Bridge-water Copper Mining Co.* 231

3. In an action of trespass brought by A. and B. against C. for taking

out of their possession a quantity of ship plank, sold to them by D. C. cannot give in evidence a judgment, against D. (with the execution thereon) entered by confession under the statute, (*Rev. Laws 634, sec. 18,*) in an action instituted before a justice of the peace without process, and without such an affidavit as is required by the act. *Sheppard & Sheppard v. Sheppard*, 250

4. An affidavit which does not conform substantially to the words of the act is the same as no affidavit, *ib.*

5. A rule to take affidavits does not expire at the next term after it is taken, but stands until the cause is argued. *Rogers v. Chadwick*, 59

6. A judgment entered by confession upon a bond and warrant of attorney under the act of 24th February 1820, (*Rev. Laws 685*) will not be set aside, because the affidavit of the plaintiff (required by the act) states that a payment was made by him of a less sum to take up a note of the defendant for a larger sum, without stating in what manner the residue was paid. *Scudder v. Scudder & Coryell*, 340

7. Nor will the judgment be set aside, because the affidavit, of the plaintiff states that the debt for which the judgment was confessed was justly due and owing to the plaintiff, without setting forth from whom, or by whom it was owing, *ib.*

8. Nor because the affidavit states that the money for which the bond was given, was lent to the defendant seven years before the date of the bond, *ib.*

9. Nor because the affidavit is in general terms and does not affix any sums or dates to the various items stated in it as composing the consideration of the bond, *ib.*

10. Nor because the day of the month is omitted in the jurat, *ib.*

11. Nor because the officer be-

fore whom the affidavit was taken, annexed to his name the letters J. P. only, and not the style of his office, in words at length, *ib.*

12. Nor because the affidavit was entitled against two persons as partners, and the judgment entered against them generally, *ib.*

13. Nor because the affidavit did not state in terms, that the notes, which formed a part of the consideration for which the bond was given, were paid, but only that they were satisfied to the holder and taken up by the plaintiff, *ib.*

14. Nor because the affidavit was made on the 6th of November, and the bond did not become due until the 7th of the same month, *ib.*

ADMINISTRATOR..

See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION BOND.

1. In an action on an administration bond, the judgment must be rendered for the penalty of the bond, and a court of law cannot assess the damages upon it. *Ordinary v. Snook et. al.* 65

2. The only way the defendant can obtain relief against the payment of the penalty, is by applying to the ordinary for a stay of execution, or stay of sale, or such reasonable further time, as may enable him to settle the estate in the Orphans' Court, in satisfaction of the bond and judgment, *ib.*

ALIENISM.

1. The plea of alienage ought to contain a direct averment that the person is an alien, and that he was born out of the allegiance of the state, and within the allegiance of a foreign state. *Coxe v. Gulick*, 328

2. Alienism will not be inferred simply from the facts, that a person

was on the 3d of July 1776, a subject of Great Britain; and in the year 1777 withdrew from this state, and took refuge with the British army, and died in England, and never took upon himself the oath of allegiance to this state or the United States, but elected to continue a subject of the King of Great Britain, *ib.*

AMERCEMENT.

If a plaintiff assigns all his interest in a suit to A. and B., and then takes the benefit of the insolvent act, and the sheriff is appointed his assignee, under the insolvent act, and the suit is carried on to judgment and execution, and the sheriff raises the money thereon, but does not pay it over to A. and B., an amercement will not be ordered against him, without proof that he had notice of the assignment to A. & B., and that he had voluntarily omitted or neglected to pay them after such notice. *The State v. Judges of Salem Pleas,* 319

AMENDMENT.

Though a writ of error has been brought, and one of the errors assigned for the reversal of the judgment is the excess of the judgment over the sum demanded in the declaration, the court will allow the party in whose favour the judgment is, to amend the record, by entering a remittitur of the surplus, and a judgment for the amount demanded in the declaration. *Herbert v. Hardenbergh,* 222

APPEAL.

I. To Court of Common Pleas.

II. To Prerogative Court.

1. The statute of November 1820, *Rev. Laws* 796, which gives the Court of Common Pleas power to grant relief, on appeal, both in matters of law, and matters of fact, means such relief as accords with

the nature of another trial, not such as belongs exclusively to a writ of error. The jurisdiction of the Supreme Court on *certiorari*, was not by that statute transferred to the Court of Common Pleas, nor are the same grounds of reversal to be applied, or prevail in one court as in the other. *Martin v. Thompson,* 142

2. The Court of Common Pleas cannot on appeal reverse the judgment of the justice, because it is not entered according to legal form. *ib.*

3. The propriety of an appeal should appear on the face of the appeal papers sent to the Court of Common Pleas, and if it does not, that court may dismiss the appeal. *Vandoren v. Vandoren,* 280

4. If it appears by the transcript that the justice took time to advise, and it does not appear that the defendant attended at the time the judgment was rendered, the Court of Common Pleas may dismiss the appeal. *ib.*

5. If from a judgment rendered by a justice in favour of a defendant, the plaintiff appeals, and on the trial of the appeal submit the cause to a jury, he cannot by voluntarily withdrawing or neglecting to appear when called, obtain a nonsuit, or prevent a verdict being rendered against him. *Williamson v. Brown,* 296

II. To Prerogative Court.

1. An appeal will not lie to the Prerogative Court, from a decree of the Orphans' Court revoking letters of guardianship. The proper method of reviewing such a decree is by writ of *certiorari*. *Tenbrook v. M'Colm,* 333

APPEAL BOND.

1. If there is an interlineation in a material part of an appeal bond, which is not noted at the foot there-

of, the bond will be defective, and the appeal may be dismissed. *Sutphin v. Hardenbergh & Tunison*, 288

2. An appeal bond executed by a minor (against whom a judgment has been rendered) and by a substantial freeholder, is sufficient to sustain an appeal, although the guardian who was appointed by the Justice's Court, to defend the suit, did not join in the bond. *Andruss Ex'rs. v. Stewart*, 160

3. It is not necessary that the amount of the judgment appealed from, should be set out in the condition of the appeal bond. *Griffith v. Sciples*, 228

ARREST.

1. If a person is arrested in this state, upon a contract made in the state of New-York, where both plaintiff and defendant resided at the time the contract was made, he will not be liberated on common bail, notwithstanding he may have taken the benefit of the insolvent law of the state of N. York subsequently to the making of the contract. *Wood & Wood v. Malin* 208

ASSIGNMENT.

An assignment of a mortgage ought to be by writing under seal. *Den v. Dimon*, 158

Assignment of breaches on administration bond. See Administration bond.

ASSESSMENT OF DAMAGES.

1. A notice to assess damages, upon a judgment entered upon a sheriff's bond is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for the defendant in the suit on the bond. The *State v. Hamilton, Edsall, et. al.* 190

2. Such notice may be given by

any attorney selected by the parties interested in obtaining the assessment, though such attorney was not the one employed in obtaining the amercements on which the assessment is to be made. *ib.*

ATTACHMENT.

I. *Against absent or absconding debtors.*

II. *Attachment for contempt.*

1. *Against absent and absconding debtors.*

1. A foreign attachment can issue only for a cause of action founded on contract, and of such a nature as to enable the plaintiff, as of course, to require special bail. *Jeffery v. Wooley*, 123

2. In some causes of action founded on covenant, an attachment will lie, and in others not, because in some the defendant may, and in others he may not be held to bail as of course. *ib.*

3. When an attachment founded on covenant, issues out of the Court of Common Pleas, and is afterwards removed by *certiorari* into the Supreme Court, the jurisdiction of the *Common Pleas*, must be shewn, and will not be presumed; and unless the affidavit shews that the cause of action was such as to enable the plaintiff to require special bail, without a judge's order, the proceedings in attachment will be quashed. *ib.*

4. The court, out of which an attachment issues, has the power to allow time to the auditors to make their report, beyond the third term from the issuing of the attachment. *Taylor et. al. v. Woodward*, 1

5. Though the language of the rule, referring back the report of auditors is, "that the report of auditors be referred back to them; and

that they have time until the first day of the next term to make their report." Yet the limitation of time contained in the rule is no wise of the essence of the authority of the auditors, nor does its lapse disrobe them of their character as auditors, or extinguish the power of the court over them and their report, *ib.*

6. The *dies datus* contained in the rule is, in legal contemplation, nothing more than a continuance; and the acceptance of the report, after the time mentioned in the rule has expired, and the rendition of judgment upon it, will be a sufficient warrant to the clerk to enter such continuances as the regularity of the record may require, *ib.*

7. Though the auditors make report at the third term, yet if the report is referred back to them, they may properly include in it the demand of a creditor not exhibited to them until after the report had been referred back, *ib.*

8. In a foreign attachment where the defendant appears and puts in special bail, it is proper since the act of 30th May 1820, (*Rev. Laws* 734, *Sec. 3*) that the rule dissolving the attachment should contain a clause, "saving all liens created by the statute." *Anonymous*, 60

9. A *scire facias*, against a garnishee in attachment, is defective, if it does not state with precision and certainty, the nature of the property attached. The words "rights and credits" do not sufficiently specify the nature of the property; and an inventory returned with a writ of attachment, would be defective, if it did not state with more certainty and precision, what was the nature of the property attached. *Neal v. Cook*, 337

II. Attachment for contempt.

1. There must be an order of

the court, to authorize the issuing an attachment against a party for not obeying an award of arbitrators, which had been made a rule of court. *McDermot v. Butler*, 158

ATTORNEY.

That the attorney of the plaintiff has no authority to prosecute the suit, is not the proper subject matter of a plea. The proper mode for the defendant to take advantage of such fact is by motion to the court, to stay proceedings. *North. Brunswick v. Booraem*, 257

AUDITORS.

See ATTACHMENT 4, 5, 6.

AWARD AND ARBITRATION.

1. Misconduct of an arbitrator cannot be pleaded, or set up, as a defence to an action of law upon an arbitration bond. The same rule prevails with respect to error or mistake of law, or fact in making an award, which does not appear upon the face of it. *Sherron v. Wood*, 7

2. Matters extrinsic, and not appearing on the face of the award cannot be pleaded in bar to an action brought upon the arbitration bond. *Per Ford, Just.* *ib.*

The Supreme Court has no summary power or equitable jurisdiction over an award, unless the submission be made a rule of court, *ib.*

BAIL.

Notice must be given of an application to discharge a defendant on common bail. *Geiger v. Morris*, 331

BILL OF EXCHANGE.

In an action brought by the payee of an order or bill of exchange against the drawer, the state of demand must substantially aver, that notice in due season, was given to the drawer, of the non-acceptance or non-payment of the bill or order. *Ribble et. al. v. Jefferson*, 139

BOND.

1. A bond in the following words : " We A. B., C. D., and E. F., are held and firmly bound unto G. H., in the sum of \$700, to be paid to the said G. H., or to their or either of their heirs, executors, administrators, or assigns, which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, severally by these presents," is a *several* bond, and not *joint* and *several*. *Brinkerhoof v. Doremus*, 119

2. The payment of the money due on the bond which accompanies a mortgage, gives the person paying the bond, no title to the mortgaged premises. *Den v. Dimon*, 156

3. In an action of debt on a bond with a penalty to secure the payment of money only, the defendant pleads payment, and gives notice of set off; and if any part of the debt has been paid, it is proper for the jury to specify, by their verdict, the exact balance due the plaintiff, although the judgment must be rendered for the penalty. *Admr. of Richman v. Richman*, 114

4. It is not necessary to assign breaches on the record after a judgment by default, on a sheriff's bond. *The State v. Hamilton, Edsall, et. al.* 190

BOOK OF ACCOUNT.

See COURT TRIAL OF SMALL CAUSES I, 2

BREACH OF ADMINISTRATION BOND.

See ADMINISTRATION BOND.

C

CAPTION.

See INDICTMENT.

CASES OVERRULED.

The case of *Rowland v. Stephenson*; 1 *Hab.* 149, overruled, in *Wood v. Mahin*, 208.

CERTIORARI.

1. Upon a *certiorari* to the Common Pleas, to remove the proceedings on an appeal from the judgment of a justice; the Supreme Court may inspect the transcript of the C. P. for the purpose of ascertaining a fact which occurred in the proceedings before them. *Dancer v. Patterson & Craven*, 255

2. Upon the argument of a *certiorari*, the plaintiff cannot assign as a cause of reversal, a special reason not stated among the reasons filed; unless there is a general reason under which it can be fairly comprehended. *Griffith v. West* 352

CERTIFICATE OF CLERK OF SUPREME COURT.

The transcript when once sealed and certified by the clerk, need not in ordinary cases be altered in the date, or re-sealed, though the trial does not take place at the first circuit after the transcript is made out and certified; but the same certificate will answer for the trial of the cause at any future time. *Den ex dem. Mickle v. Dunham et. al.* 150

CHARGE.

Where the jury is called upon to weigh the contradictory testimony of two surveyors, it is not an objection to the charge of the judge that he hold the jury, "that in estimating and comparing the conflicting opinions of the surveyors, they should not overlook the fact that the plaintiff's surveyor was the same man by whom the lots were originally surveyed and laid out." *Den v. Emerson*, 279

CHURCH.

See EMBLEMENTS.

CONFESSIONS.

1. A verbal confession of guilt made by a person accused of a crime, if induced by a delusive hope

of impunity excited in his mind, will not be received in evidence; and a written examination of the accused, made by a justice within a few hours after the verbal confession, will also be inadmissible upon the presumption that the same inducement which operated upon his mind at the time he made the verbal confession, might have continued to operate, at the time of the written examination. *State v. James Guild*, 163

2. When once a confession under influence is obtained, a presumption arises that a subsequent confession of the same nature, flows from the like influence, and such presumption ought to be overcome before the confession can be given in evidence, *ib.*

3. Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts may be admitted, if the court believe from the length of time intervening, from proper warning or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained, were entirely dispelled, *ib.*

4. A prisoner may be convicted on his own confession, when proved by legal testimony, although it is uncorroborated by any other evidence, provided the *corpus delicti* is proved, *ib.*

5. Corroborating circumstances, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such in short, as may serve to impress a jury with a belief of its truth, *ib.*

6. A boy of the age of twelve years and five months, may be convicted on his own confessions of the crime of murder, and executed. The capacity to commit a crime necessarily supposes the capacity to confess it, *ib.*

COMMISSION.

1. The affidavit to show that a witness lives out of the state, and thereby to obtain a commission for the examination of such witness, need not be taken on notice. *Den v. Wood, et. al.* 62

2. The commission may be opened by a judge in vacation, *ib.*

An order for the issuing of the commission, of itself stays the proceedings, *ib.*

COMMISSIONERS FOR SALE OF LANDS.

When the portion of money arising from the sale of lands, in which the widow has a right of dower, is put out by commissioners on bond according to the statute (*Rev. Laws 599*), the bond should be taken in the name of the commissioners and not of the widow, *Mattet of Elizabeth Stevenson*, 60

COMMON PLEAS.

The Court of Common Pleas, cannot on appeal reverse the judgment of the justice, because it is not entered in legal form. *Martin v. Thompson*, 142

CONTRACT.

1. A contract which contravenes the policy of an act of congress, and tends to defraud the United States, is void. *Gulick v. Ward*, 87

2. If A. agree to give B. \$1000, on condition that B. will forbear to propose or offer himself to the Post Master General to carry the mail on a mail route; such agreement is against public policy, and no action can be maintained upon it, *ib.*

CONSOLIDATION.

The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promissory notes drawn at different dates, and payable at different times, where it does not appear that the

defence is the same in each. *Worley & Welsh v. Glentworth*, 241

CONSTRUCTION.

If the lease, in a declaration in ejectment, is stated to have been made on the 7th of July 1825, to hold from "the 6th day of July then last past" it shall be construed to mean the 6th day of July 1825, not the 6th day of July 1824, which was prior to the accrual of the plaintiff's title; for where the words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted rather than that which would destroy it. *Den v. Vanness*, 102

CORPORATION.

The misnomer of a corporation in a grant or obligation, does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument, be shown by proper and apt averments and proof. *Inhabitants of Alloways Creek v. String*, 323

COSTS.

1. The court will not order the plaintiffs to give security for costs, upon the ground that but one of the plaintiffs reside in this state, and that he had several years before the commencement of the suit, taken the benefit of the insolvent law. *Den ex dem. Peterson v. Bogue*, 192

2. A party cannot commence a second action in the same court, for the same cause of action, until the costs of the first action are paid; and the rule is the same as to all courts within the same jurisdiction. *Swing et. al. v. The Inhabitants of The Upper Alloways Creek, in the county of Salem*, 58

3. Upon the quashing of an at-

tachment, for not obeying an award the attorney of the defendant is entitled to the same costs as in other civil cases. *McDermott ads. The State, Robert Butler Prosecutor*, 63

COVENANT.

1. A covenant that one is lawfully seized of land, when in truth he is not, is broken as soon as made; and such a covenant cannot be assigned so as to enable the assignee to maintain an action for a breach that happened before his time. *Chapman v. Holmes*, 20

2. So also a covenant that a grantor has good right to grant, sell, and convey land, when he has not such right, is broken as soon as made, and not assignable, *ib.*

3. The rule is the same as to covenants against incumbrances, when there are incumbrances existing at the time of the sale, *ib.*

4. If the vendor of lands in fee covenants, for himself and his heirs, that he will warrant and defend the land to the vendee, his heirs and assigns, an assignee of the vendee who is evicted, may maintain a personal action of covenant against the executors of the vendor; and it is not necessary to maintain the action, to aver that notice of the pendency of the suit, by which the plaintiff was evicted, was given to the defendant, *ib.*

COURT FOR THE TRIAL OF SMALL CAUSES.

I. State of demand.

II. Adjournment.

III. Judgment.

IV. Transcript.

V. Process and other proceedings.

I. State of demand.

1. An item in a plaintiff's state of demand, or copy of his account, charging defendant "to loading ves-

vel at his wharf, at Cedar Bush Landing," may be considered as a charge for wharfage and not a trespass. *Cornelius v. Ivins*, 56

2. A general charge "to sundries as per day book," if it stood alone would be objectionable, but if on the same date there is a credit given to the defendant for the same amount, and in the same language, the judgment will not be reversed for the generality of the charge, *ib.*

3. If on the debit side of the account, there is a general charge for sundries, making the plaintiff's demand exceed the sum of \$100; yet if on the credit side of the account, there is a general credit given the defendant for the same sum in the same language, and of the same date which reduces the balance of plaintiff's demand under \$100, the justice has jurisdiction of the cause, *ib.*

4. The time when services were rendered, for which plaintiff claims compensation, should be alleged in the state of demand, and if no time is stated, the judgment will be reversed. *Vanguilder v. Stull*, 233

II. Adjournment.

If a defendant in a cause pending before a justice of the peace, and in which he has a defence, is lead into a mistake with regard to the time to which the cause is adjourned, and the trial is had in his absence, and without his knowledge, the court will reverse the judgment. *Probasco v. Hartough*, 55

III. Judgment.

1. This court will not reverse the judgment for an omission to charge the jury upon a special proposition, stated by counsel, unless it be made clearly to appear that the proposition was warranted by the evidence and necessarily involved in the verdict to be rendered. *Davison v. Schooley*, 145

z z

2. Where judgment is rendered for treble costs, it is not necessary to state first, the amount of the single costs, and then the treble sum. It is sufficient to state it thus: "\$49 being treble the costs and charges of the" plaintiff, *ib.*

3. If judgment is rendered for a sum exceeding the amount mentioned in the state of demand, the judgment will be reversed. *Lake & Vankirk v. Merrill*, 288

IV. Transcript.

1. A statement, on the transcript of the C. P. that the counsel of the defendant "relied on the statute of limitations, as a bar to the demand of the plaintiffs, and that no evidence of a promise or acknowledgment, had been proved to have been made by the plaintiffs within six years" is insufficient to shew that no evidence of a promise or acknowledgment was proved, or to prove error in the court below, in refusing the defendant the benefit of the statute of limitations. *Dancer v. Patterson, & al.* 255

2. If it appears by the transcript, that the justice took time to advise, and it does not appear that the defendant attended at the time the judgment was rendered, the Court of Common Pleas may dismiss the appeal. *Vandoren v. Vandoren*, 286

V. Process and other proceedings.

1. If a summons is issued in the name of J. M. plaintiff, and in the state of demand, a middle letter is inserted in the name of the plaintiff, (viz. J. S. M.) and the defendant does not appear, but judgment is rendered against him in his absence, the judgment will be reversed. *Bowen v. Mulford*, 230

2. In actions by informers on penal statutes, the justice is required to

make a special note of the day, month, and year of their institution. And this note should be made at the time, or on the day of the commencement of the suit; and if the justice omits to make the entry until the return of the summons, the judgment will be reversed. *Griffith v. West, ib.* 301

3. To authorize a justice to enter an action "by agreement of the parties without process" under the 18th section of the act for the trial of small causes, (*Rev. Laws, 634.*) the plaintiff and defendant should appear before the justice to manifest their consent, or some person on behalf of the plaintiff, having competent authority, and such authority should be verified before the justice, *Young v. Stout, ib.* 302

4. The defendant can with no propriety become the representative of the plaintiff, more especially to communicate to the justice the agreement of the parties for the entry of an action, *ib.*

CROP GROWING.

See EMBLEMENTS.

DATE.

See STATE OF DEMAND.

DECLARATION.

See PLEAS & PLEADINGS I. 1.

DEMURRER.

A demurrer admits all such facts as are sufficiently pleaded, but is no admission of such as are not sufficiently pleaded. *Coxe v. Gulick, 328*

DISCHARGE OF INSOLVENT:

If a defendant neglects to plead his discharge under the insolvent act, in an action for a debt contracted previous to his discharge, and suffers the regular time for pleading the same, to elapse, under a mistaken idea of the law, the court will not

permit him afterwards to withdraw a *relicta*, given by him at the circuit, in order to plead his discharge. *Ex'rs of Ackerman v. Van Houten, 332*

DECLARATION.

See PLEAS & PLEADINGS, I. 1.

DEED.

A sheriff's deed takes full effect only from the time of delivery, and does not relate back to the time of sale so as to sustain an intermediate sale and conveyance by the sheriff of the lands therein mentioned. *Den ex dem. Green v. Steelman, 193*

If a deed made between A. party of the first part, and C. & D. his wife, party of the second part, grants, bargains, and sells unto the said party of second part, his heirs and assigns, a piece of land; and C. dies, his wife D. him surviving, she will be entitled to the whole of the estate during her life. *Den ex dem. Hardenbergh v. Hardenbergh, 42*

DEVISE.

M. devises as follows: "I give and devise the plantation, whereon I now live, to my son Aaron and his male heirs, lawfully issuing, and for the want of such heirs, I give the same to my son Barnt, and his male heirs lawfully issuing; and for the want of such heirs, I give the same to my son John and his male heirs lawfully issuing; and for want of such heirs to return back, &c. On the death of the testator, Aaron entered and died seized without issue. Barnt the second devisee then entered and became seized, but died out of possession, leaving three sons and three daughters, of whom Lewis Mason was the eldest; by this devise, Lewis, under the operation of the statute *de donis*, takes an estate tail. *Den ex dem. Mason v. Smith, et. al. 39*

EJECTMENT.

1. A mortgagor will not be permitted to dispute a title derived under his mortgage, nor allege any thing in opposition to a claim founded on it. Nor can he set up an outstanding title in another, for the purpose of defeating a recovery in an action of ejectment upon the mortgage. *Den v. Vanness*, 102

2. Though the lessor of the plaintiff, as the assignee of the mortgagee, and as purchaser of the equity of redemption, unite both the legal and equitable claim in himself, no such merger will be thereby produced as to prevent him from maintaining ejectment against the mortgagor, *ib.*

3. If the lease in a declaration in ejectment, is stated to have been made on the 7th day of July 1825, to hold from "the sixth day of July then last past" it shall be construed to mean the 6th day of July 1825, and not the sixth day of July 1824, which was prior to the accrual of the plaintiff's title; for where the words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted rather than that which would destroy it, *ib.*

4. A defendant in an action of ejectment, cannot set up an outstanding mortgage in the hands of a stranger to defeat the title of the mortgagor or his heirs. *Den v. Dimon*, 156

5. A judgment by default in ejectment, against the casual ejector, for want of an appearance, will not be set aside because the declaration in ejectment was served by the lessor of the plaintiffs. *Den v. Fen*, 237

6. An affidavit of the service of a declaration in ejectment which states that the copy was "served upon A. B. said to be one of the directors of the within named company" is insufficient, *ib.*

7. The notice subjoined to the declaration must be read, or its con-

tents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service; and that it has been so done, should be stated in the affidavit, *ib.*

8. If the service of the declaration in ejectment, is not in the regular and ordinary manner, a judgment by default, for want of an appearance, should not be entered, until the court on a rule to shew cause has sanctioned the mode of service, *ib.*

9. In an action of ejectment brought by the assignee of a mortgagee against a mortgagor, upon a mortgage given to a corporation, it is unnecessary to produce the charter of incorporation. The admission by the defendant himself in the deed of mortgage, is sufficient proof, when uncontradicted, of the existence of the corporation. *Den v. Vanhouten*, 270

EMBLEMENTS.

If A. as minister of a certain church, is entitled to the possession of the parsonage land, and while in possession sows the land with grain, then sells the growing crop to B. and voluntarily ceases to be minister of that church, leaves the parsonage land and removes to another congregation before the crop is harvested, B. has not such a title to the crop, as to enable him to maintain trover against a person who takes it away. A disclaimer by the consistory of the church of all title to the crop in question, is not evidence to support the title of B. *Debow v. Colfax & al.* 128

He who has an estate in lands, the duration of which is uncertain in point of time, and he who has such an estate as may perhaps continue until the grain be ripe, shall if he sows the land, be permitted to enter upon it at harvest, and reap the crop

although in the mean time his estate may have ended, either by the act of God, or of the law. But if the estate is between seed time and harvest, determined by the act of the tenant, the growing crop passes with the land, to him who thereupon becomes the immediate owner of the latter, *ib.*

ERROR.

The refusal of a court to continue a cause after it is at issue is not a matter upon which error can be assigned. *McCury v. Doremus and Suydam*, 245

In making a return to a writ of error, the schedule should contain simply a transcript of the record from the book of judgments, *ib.*

EXECUTORS AND ADMINISTRATORS.

If a creditor of an insolvent estate, neglect to exhibit under oath, his claim to the administrator of his deceased debtor, within the time prescribed by the rule of the Orphans' Court for that purpose, he will not be allowed to come in for a ratable proportion of the estate of the deceased in the hands of the administrator. *Vandyke & al. Trustees of Mead v. Chandler, & al.* 49

ESTATE.

I. Estate for life.

II. Estate tail.

III. Joint tenancy.

I. For life.

1. If a deed made between A. party of the first part, and C. and D. his wife, party of the second part, grants, bargains, and sells, unto the said party of the second part, his heirs and assigns, a piece of land, and C. dies, his wife D. him surviving, she will be entitled to the whole of the estate during her life. *Den v. Hardenbergh*, 42

II. Estate tail.

The statute of New-Jersey of 13th June, 1799, abolishing all English statutes, did not abolish estates tail. *Per Ford, J. Den v. Mason*, 39

III. Estate in joint tenancy.

1. A conveyance of lands to a man and his wife, made after their intermarriage, does not, strictly speaking, create them joint tenants, but creates an estate of a peculiar nature of which they are seized, not *per my et per tout*, (as joint tenants would be), but solely and simply *per tout*. *Den v. Hardenbergh*, 42

3. The statute of N. J. (*Revised Laws*, 556.) which enacts "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy, and not an estate of tenancy in common, does not apply to an estate granted to husband and wife, *ib.*

EVIDENCE.

I. Parol.

II. Written.

I. Parol.

1. A verbal confession of guilt made by a person accused of a crime, if induced by a delusive hope of impunity excited in his mind, will not be received in evidence, and a written examination of the accused made by a justice within a few hours after the verbal confession, will also be inadmissible upon the presumption that the same inducement which operated upon his mind at the time he made the verbal confession, might have continued to operate, at the time of the written examination. *State v. James Guild*, 163

2. When once a confession un-

der influence is obtained, a presumption arises that a subsequent confession of the same nature flows from the like influence, and such presumption ought to be overcome, before the confession can be given in evidence, *ib.*

3. Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believe, from the length of time intervening, from proper warning, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained, were entirely dispelled. *ib.*

4. A prisoner may be convicted on his own confession, when proved by legal testimony, although it is uncorroborated by any other evidence, provided the *corpus delicti* be proved, *ib.*

5. Corroborating circumstances, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such, in short, as may serve to impress a jury with a belief of its truth, *ib.*

6. A boy of the age of twelve years and five months, may be convicted on his own confession, of the crime of murder, and executed. The capacity to commit a crime necessarily supposes the capacity to confess it, *ib.*

7. An interest in the question in controversy, does not disqualify a person from being a witness; the interest which excludes a witness is an interest in the event of the suit. *Admrs. of Drake v. Maxwell*, 297

8. If A. bring an action against B. for the amount of a due bill given by B. to A.; and B. pleads payment and gives notice of his inten-

tion to prove on the trial, that C. in his life time agreed to pay and did pay A. the amount of the due bill, and offers D. the executor and residuary legatee of C. to prove the fact of payment, C. is a competent witness for that purpose, *ib.*

9. The facts that a mortgagee knew at the time when he took the mortgage, that the land had belonged to a decedent, and that the decedent left debts unpaid, would not of themselves alone be evidence of bad faith in the mortgage. *Den v. Jaques*. 259

II. Written.

1. An inquisition of lunacy is not conclusive against any person not a party to it. *Den v. Clark*, 217

When an inquisition is admitted in evidence, the party against whom it is used, may introduce proof that the alleged lunatic was of sound mind, at any period of time covered by the inquisition, *ib.*

2. The party against whom the inquisition is received may impugn the finding by contrary evidence, without first pursuing the procedure technically called a traverse of the inquisition, *ib.*

3. If the subscribing witness to an instrument reside out of the reach of process of the court, his hand writing may be proved. *Den v. Vanhouten*, *ib.*

4. In an action of ejectment, brought by the assignee of a mortgagee against a mortgagor, upon a mortgage given to a corporation, it is not necessary to produce the charter of incorporation. The admission by the defendant himself in the deed of mortgage, is sufficient proof, when uncontradicted, of the existence of the corporation, *ib.*

5. In order to prove that the

INDEX.

e of action of a former suit of
pass, was the same as that for
a subsequent suit of trespass
the case was brought, it is neces-
to produce not only the trans-
t but the state of demand also.
until this is done parol evidence
he identity of the subject mat-
of both suits cannot be received.
Wisson v. Gardner, 289

. In an action of trespass brought
A. and B. against C. for taking
of their possession a quantity of
plank, sold to them by D., C.
not give in evidence a judgment
inst D. (with the execution there-
entered by confession under the
ute, (*Rev. Laws*, 635, *Sec.* 18.)
n action instituted before a justice
the peace without process, and
hout such affidavit as is required
the act. *Sheppard v. Shep-*
d, 250

7. Such a judgment, although
id between the parties has no op-
tion against third persons, and
not be read in evidence even in
igation of damages, *ib.*

8. In order to prove the oaths of
ice of surveyors of highways, it
not necessary to produce the ori-
al oaths which are filed with the
rk of the township; it is suffi-
nt to produce copies proved to be
ie copies. *State v. Hutchinson*, 242

9. Proof of placing in the Post
fice, a letter containing notice of
rial directed to the defendant's at-
ney, residing in a post town, in
ie season to be received, the legal
riod before the day of trial, will,
made in the presence of the de-
ndant's attorney, and until repelled,
ise a presumption, and stand for
oof of the service of notice.
Courry v. Doremus, 245

10. But this presumption may be
pelled by the affidavit of the at-
rney to whom the notice was direc-
d, stating that it was not receiv-
l, *ib.*

FEME COVERT.

See HUSBAND & WIFE.

FIERI FACIAS.

1. A purchaser of lands at she-
riff's sale, has not previous to the ma-
king and delivering to him of the
sheriff's deed, for said lands, such
an interest therein as can be levied
upon and sold by virtue of a fieri
facias de bonis et terris. *Den. ex dem.*
Green v. Steelman & al. 193

2. A levy may be made on lands
acquired after the date of the judg-
ment, or conveyed to other persons
before the date of the execution. *Per*
Drake Justice, *ib.*

GUARDIAN.

1. A lease made by the guardian
of an infant under the age of four-
teen years for a term of years ex-
tending beyond the arrival of the
infant at that age is voidable, and
may be avoided by another guardian
chosen by the infant after he attains
the age of fourteen. *Snook ex dem.*
Coursen v. Sutton et. al. 133

2. An appeal will not lie to the
Prerogative Court, from a decree
of the Orphans' Court, revoking let-
ters of guardianship. The proper
method of reviewing such a decree
is by writ of certiorari. *Tenbrook*
v. McCalm, 333

GARNISHEE.

See SCIRE FACIAS.

ATTACHMENT.

HAND-WRITING.

See WITNESS.

HEIR.

In an action against the surviving
heirs of an obligor upon a bond of
their ancestor, the heirs of a deceased
heir having lands by descent, should
be joined in the action, and if they
are not, the non joinder may be plea-
ded in abatement. *St. Mary's*
Church v. Wallace, 311

2. Where lands descended, are bona fide aliened by the heir before suit brought, they cannot be taken in execution on a judgment against the heir for a debt of his ancestor.

Den v. Jaques, 259

3. And a mortgage by the heir of the lands descended, before suit brought, is considered as an alienation, within the meaning of the statute, *ib.*

HIGHWAYS.

See ROAD.

HUSBAND AND WIFE.

1. If a deed made between A. party of the first part, and C. and D. his wife, party of the second part, grants, bargains and sells unto the said party of the second part his heirs and assigns a piece of land, and O. dies, his wife D. him surviving, she shall be entitled to the whole of the estate during her life.

Den v. Hardenbergh, 42

2. A conveyance of lands to a man and his wife, made after their intermarriage, does not, strictly speaking, create them joint tenants, but creates an estate of a peculiar nature of which they are seized, not *per my et per tout* (as joint tenants would be) but solely and simply *per tout*, *ib.*

INDICTMENT.

1. An indictment for selling liquor by small measure, which only alleges that the defendant, did not obtain a license according to the act concerning inns and taverns, is insufficient and will be quashed. *The State v. Webster*, 293

2. If the caption of an indictment do not show distinctly the names and style of office of the judges composing the court to which it is presented, the indictment will be quashed. *State v. Zula*, 348

INFANT.

See GUARDIAN.
LEASE.

INFORMERS.

In actions by informers on penal statutes, the justice is required to make a special note of the day, month, and year of their institution. And this note should be made at the time or on the day of the commencement of the suit; and if the justice omits to make the entry until the return of the summons, the judgment will be reversed. *Griffith v. West*, 301

INQUISITION.

1. An inquisition of lunacy, is not conclusive against any person not a party to it. *Den v. Clark*, 217

2. When an inquisition is admitted in evidence, the party against whom it is used, may introduce proof that the alleged lunatic was of sound mind, at any period of time covered by the inquisition, *ib.*

3. The party against whom the inquisition is received, may impugn the finding, by contrary evidence without first pursuing the procedure technically called a traverse of the inquisition, *ib.*

INSOLVENT.

1. If a person is arrested in this state, upon a contract made in the state of New-York, where both plaintiff and defendant resided at the time the contract was made, he will not be liberated on common bail, notwithstanding he may have taken the benefit of the insolvent law of the state of New-York, subsequently to the making of the contract. *Wood v. Malin*, 208

2. If a defendant neglects to plead his discharge under the insolvent act, in an action for a debt contracted previous to his discharge and suffers the regular time for pleading

the same to elapse under a mistaken idea of the law, the court will not permit him afterwards to withdraw a *relicta* given by him at the circuit in order to plead his discharge. *Ex'rs. of Ackerman v Vanhouten*, 332

3. An insolvent debtor who has been remanded to prison upon the undertaking of a creditor to prove that he had not fairly delivered up his property to the use of his creditors, and who had joined issue with his creditors, upon the fairness of his surrender, according to the form of pleadings prescribed by the insolvent act, (*Rev. Laws*, 219,) cannot have a judgment entered in his favour by default of the creditor to appear against him, but must go on and prove his case to the jury, and obtain their verdict. *Williamson v. Booraem*, 351

INSOLVENT ESTATE.

If a creditor of an insolvent estate neglect to exhibit, under oath, his claim to the administrator of his deceased debtor, within the time prescribed by the Orphans' Court, for that purpose, he will not be allowed to come in for a ratable proportion of the estate of the deceased, in the hands of the administrator. *Trustees of Meade v. Admr. of Chandler*, 49

INTERLINEATION.

If there is an interlineation in a material part of an appeal bond, which is not noted, the bond will be defective, and the appeal may be dismissed. *Sutphin v. Tunison*, 288

INVENTORY.

An inventory returned with a writ of attachment is defective, if it do not state with certainty and precision what is the nature of the property attached. *Neal v. Cook*, 337

JOINT TENANCY.

See ESTATE IN JOINT TENANCY.

JUDGMENT.

I. Generally.

II. By Confession.

1. In an action on an administration bond, the judgment must be rendered for the penalty of the bond, and a court of law cannot assess damages upon it. *Ordinary v. Snook et. al.* 65

2. The Court of Common Pleas, cannot on an appeal, reverse the judgment of the justice, because it is not entered according to legal form. *Martin v. Thompson*, 142

3. This court will not reverse the judgment of a justice on account of an omission to charge the jury upon a specific proposition stated by counsel, unless it be made clearly to appear, that the proposition was warranted by the evidence, and necessarily involved in the verdict to be rendered. *Davison v. Schooley*, 145

4. Where judgment is rendered for treble costs, it is not necessary to state, first, the amount of the single costs, and then the treble sum. It is sufficient to state it thus, "\$49 being treble the costs and charges of the" plaintiff, *ib.*

5. A judgment by default, in ejectment, against the casual ejector for want of an appearance, will not be set aside because the declaration in ejectment was served by the lessor of the plaintiff. *Den ex dem. Auten v. Fen*, 237

6. If the service of the declaration in ejectment is not in the regular and ordinary manner, a judgment by default, for want of an appearance, should not be entered, until the court on a rule to shew cause has sanctioned the mode of service, *ib.*

7. In making return to a writ of error, the schedule should contain

simply a transcript of the record from the book of judgments. *M'Courry v. Doremus et. al.* 245

8. If judgment is entered for a sum exceeding the amount mentioned in the state of demand, the judgment will be reversed. *Lake & Van-kirk v. Merrill,* 288

9. If in an action of debt on a bond, with a penalty to secure the payment of money only, the defendant pleads payment and gives notice of set off, and any part of the debt has been paid, it is proper for the jury to specify, by their verdict, the exact balance due the plaintiff, although the judgment must be rendered for the penalty. *Richman v. Richman,* 114

10. An insolvent debtor, who has been remanded to prison upon the undertaking of a creditor to prove that he had not fairly delivered up his property to the use of his creditors, and who had joined issue with his creditor upon the fairness of his surrender, according to the form of pleadings prescribed by the insolvent act (*Rev. Laws*, 219,) cannot have a judgment entered in his favour by default of the creditor, to appear against him, but must go on and prove his case to the jury, and obtain their verdict. *Williamson v. Booraem,* 351

II. By Confession.

1. A judgment entered by confession under the statute, (*Rev. Laws* 634, *Sec. 18*,) in an action instituted before a justice of the peace without process, and without such an affidavit as is required by the act, though valid between the parties, has no operation against third persons, and cannot be read in evidence even in mitigation of damages. *Sheppard v. Sheppard,* 250

2. A judgment rendered on the confession of the defendant in an ac-

tion entered by consent of the parties, without process, and without the appearance of the plaintiff, or any person legally authorized to represent him before the justice, will be reversed on the application of the personal representatives of the defendant. *Young's Admrs. v. Stout.* 302

JUDICIAL PROCEEDINGS.

An order of filiation is a judicial act, and must be executed by the justices jointly, and not separately. Therefore an order of filiation though agreed upon when the justices were together, yet if signed by them separately, and in the absence of each other, will be quashed. *State v. Prall,* 161

JURY, GRAND.

See ABATEMENT 1, 2, 3.

JUSTICES OF THE PEACE.

If the proceedings in a matter of road are removed into the Supreme Court, and an objection is there taken, that the surveyors did not take the oath prescribed by law; unless it appears in some way, either upon the face of the affidavit or otherwise that the person before whom the oath was taken, was a justice of the peace, the proceedings will be set aside. *State v. Hutchinson,* 242

JUSTICES COURT.

See COURT FOR THE TRIAL OF SMALL CAUSES.

LEASE.

A lease made by the guardian of an infant, under the age of fourteen years, for a term of years extending beyond the arrival of the infant at that age is voidable, and may be avoided by another guardian chosen by the infant after he attains the age of fourteen. *Snook v. Sutton,* 133

See CONSTRUCTION.

LEX FORI.

The method in which a demand is to be enforced, is to be determined by the law of the state in which the action is brought, and not according to the law of the state where the demand originally accrued. *Wood v. Malin*, 204

LEVY.

A levy may be made on lands acquired after the date of the judgment, or conveyed to other persons before the date of the execution. *Per Drake, justice. Den ex dem. Green v. Steelman*, 193

LIMITATIONS, STATUTE OF.

1. The statute of limitations begins to run, and is to be computed only from the time of payment, and not from the date of the bond. *Admr. of Richman v. Ex'rs. of Richman*, 114

2. A statement on the transcript of the C. P. that the counsel of the defendant "relied on the statute of limitations, as a bar to the demand of the plaintiffs, and that no evidence of a promise or acknowledgment had been proved to have been made by the plaintiffs within six years" is insufficient to shew that no evidence of a promise or acknowledgment was proved, or to prove error in the court below in refusing the defendant the benefit of the statute of limitations. *Dancer v. Patterson & Craven*, 255

LUNACY.

See INQUISITION.

MAIL.

See CONTRACT.

MANDAMUS.

1. A mandamus will be issued to a court, only to direct the court to proceed according to law, but not to direct them how to proceed. *Roberts v. Holsworth*, 57

2. One and the same writ of mandamus cannot be directed to the township committees of two several townships, to compel them to proceed to do their duty in a matter of road. *State v. Township Committees of Chester and Evesham*, 292

MINOR.

An appeal bond executed by a minor, (against whom a judgment has been rendered) and by a substantial freeholder, is sufficient to sustain an appeal, although the guardian who was appointed by the Justice's Court to defend the suit, did not join in the bond. *Andruss v. Stewart*, 160

MISNOMER.

The misnomer of a corporation in a grant or obligation does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument, be shown by proper and apt averments and proof. *Inhabitants of Township of Alloways Creek v. String*, 323

MORTGAGE.

1. A defendant in an action of ejectment, cannot set up an outstanding mortgage in the hands of a stranger to defeat the title of the mortgagor or his heirs. *Den ex dem. Dimon v. Dimon*, 156

2. The assignment of a mortgage ought to be by writing under seal, *ib.*

3. The payment of the money due on a bond which accompanies a mortgage, gives to the person paying the bond no title to the mortgaged premises, *ib.*

4. A Mortgagor will not be permitted to dispute a title derived under his mortgage, nor allege any thing in opposition to a claim founded on it; nor can he set up an outstanding title in another, for the pur-

pose of defeating a recovery in an action of ejectment upon the mortgage. *Den ex dem. Burhans v. Van-ness*, 102

5. Though the lessor of the plaintiff, as the assignee of the mortgagee, and as purchaser of the equity of redemption, unite both the legal and equitable title in himself, no such merger will be thereby produced, as to prevent him from maintaining ejectment against the mortgagor, *ib.*

6. In an action of ejectment brought by the assignee of a mortgagee against a mortgagor, upon a mortgage given to a corporation, it is not necessary to produce the charter of incorporation. The admission by the defendant himself in the deed of mortgage, is sufficient proof when uncontradicted, of the existence of the corporation. *Den ex dem. Lorrillard v. Van Houten*, 270

7. When lands descended, are bona fide aliened by the heir before suit brought, they cannot be taken in execution on a judgment against the heir for a debt of his ancestor. *Den ex dem. Hatfield v. Jaques*, 259

8. And a mortgage by the heir, of the lands descended, before suit brought, is considered as an alienation within the meaning of the statute, *ib.*

9. The facts that the mortgagee knew at the time when he took the mortgage, that the land had belonged to the decedent, and that the decedent left debts unpaid, would not of themselves, be evidence of bad faith in the mortgagee, *ib.*

MURDER

A boy of the age of twelve years and five months, may be convicted on his own confessions, of the crime of murder and executed. The capacity to commit a crime necessarily supposes the capacity to confess it. *State v. Guild*, 163

NEW TRIAL.

1. This court will set aside a verdict, and grant a new trial if in their opinion the verdict is against the weight of evidence, or if justice has not been done. *Hutchinson v. Coleman*, 74

2. This court will not grant a new trial, on account of the discovery of new and important evidence, if such evidence might with ordinary diligence have been discovered previous to the trial. *Sheppard v. Sheppard*, 250

3. This court will not grant a new trial, on account of newly discovered evidence, unless the facts newly discovered are laid before the court in the shape of legal evidence and not hearsay, *ib.*

4. Where the jury is called upon to weigh the contradictory testimony of two surveyors, it is not an objection to the charge of the judge that he told the jury, "that in estimating and comparing the conflicting opinions of the surveyors, they should not overlook the fact that the plaintiff's surveyor was the same man by whom the lots were originally surveyed and laid out." *Den ex dem. Brower v. Emerson*, 279

NON PAYMENT, NOTICE OF.

See PROMISSORY NOTE.

NOTICE.

1. Notice must be given of an application to discharge a defendant on common bail. *Geiger ads. Morris*, 331

2. A notice to assess damages, upon a judgment entered upon a sheriff's bond, is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for the defendants in the suit on the bond. *State v. Edsall*, 190

3. Such notice may be given by

any attorney selected by the parties, interested in obtaining the assessment, though such attorney was not the one employed in obtaining the amercements on which the assessment is to be made, *ib.*

4. The notice subjoined to the declaration in ejectment must be read, or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of service, and that it has been so done should be stated in the affidavit. *Den v. Bridgewater Copper Mining Company,* 237

See PROMISSORY NOTE.

OATHS OF OFFICE.

In order to prove the oaths of the surveyors, it is not necessary to produce the original oaths which are filed with the clerk of the township; it is sufficient to produce copies proved to be true copies. *State v. Hutchinson,* 242

See SURVEYORS.

ORDER.

An order of filiation is a judicial act, and must be executed by the justices jointly, and not separately. Therefore an order of filiation, though agreed upon when the justices were together, yet if it was signed by them separately, and in the absence of each other, will be quashed. *State v. Prall,* 161

See PROMISSORY NOTE.

ORDINARY.

The only way that a defendant can obtain relief against a judgment entered against him for the penalty of an administration bond, is by applying to the Ordinary for a stay of execution, or stay of sale, or such reasonable further time as may en-

able him to settle the estate in the Orphans' Court, in satisfaction of the bond and judgment. *Ordinary v. Hart,* 65

PARSONAGE.

See EMBLEMENTS.

PAYMENT.

1. The statute of limitations begins to run, and is to be computed only from the time of payment. *Admr. of Richman v. Richman,* 114

2. Where money has been paid by defendant, under a judgment, which is subsequently reversed, and it appears by the record, that such payment was made, the court will order restitution. *Scott v. Conover,* 61

3. The payment of the money due on the bond which accompanies a mortgage, gives to the person paying the bond, no title to the mortgaged premises. *Den v. Dimon,* 156

PENALTY.

If in an action of debt on a bond, with a penalty to secure the payment of money only, the defendant pleads payment, and gives notice of set off, and any part of the debt has been paid, it is proper for the jury to specify by their verdict the exact balance due the plaintiff, although the judgment must be rendered for the penalty. *Richman v. Richman,* 114

In an action on an administration bond, the judgment must be rendered for the penalty of the bond, and a court of law cannot assess damages upon it. *Ordinary v. Hart,* 65

The only way the defendant can obtain relief against the payment of the penalty is by applying to the Ordinary for a stay of execution, or stay of sale, or such reasonable further time as may enable him to settle the estate in the Orphans' Court, in satisfaction of the bond and judgment, 66

PERFORMANCE.

See PROMISE.

PLEADINGS, I. 1.

PLEAS AND PLEADINGS.

I. Declaration.

II. Pleas.

III. Demurrer.

I. Declaration.

1. A declaration on a contract for the sale of lands at auction, one of the conditions of which was "that the purchaser should pay the purchase money, and the vendors deliver a deed for the premises within six days from the day of sale," should contain an averment of a tender of the purchase money, by the plaintiff; an averment merely that the plaintiff was ready and willing to perform all things on his part to be performed, and to pay the money and to complete the contract is not sufficient. And the same averment is necessary where the contract was that the purchaser should pay the purchase money "on the 15th of Sept. 1827, on having a good and sufficient title made to him for the land." *Ackley v. Elwell*, 304

2. If a lease in a declaration of ejectment, is stated to have been made on the 7th of July 1825, to hold from the "6th day of July then last past," it shall be construed to mean the 6th day of July 1825, and not the 6th day of July 1824, which was prior to the accrual of the plaintiff's title; for where words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted, rather than that which would destroy it. *Den v. Van-ness*, 102

II. PLEAS.

1. In abatement.

1. If a summons issuing out of the Supreme Court, calls upon the

defendants to answer the plaintiff in a plea of trespass, and also to a bill to be exhibited against the defendants to the damage of the plaintiff \$8000, and the declaration is in assumpsit, the defendant may craveoyer of the suit, and plead in abatement, the variance between the summons and the declaration, and such plea will be good. *Schenck v. Ex'rs. of Schenck*, 274

2. A plea in abatement to a declaration in assumpsit, that another action had been previously commenced by the defendant against the plaintiff in which the matters mentioned in the declaration might be set off is good. *Ex'rs. Schenck v. Schenck*, 276

3. In an action against the surviving heirs of an obligor upon a bond of their ancestor, the heirs of a deceased heir, having lands by descent should be joined in the action, and if they are not the non joinder may be pleaded in abatement. *St. Mary's Church v. Wallace*, 311

4. That the attorney of the plaintiff has no authority to prosecute the suit, is not the proper subject matter of a plea. The proper mode for the defendant to take advantage of such a fact, is by motion to the court to stay proceedings. *Inhabitants of North Brunswick v. Booraem*, 257

5. In an action of dower the defendant may plead in abatement that the husband of the demandant was an alien. *Coxe v. Gulick*; 323

6. The plea of alienage ought to contain a direct averment that the person is an alien, and that he was born out of the state, and within the allegiance of a foreign state, *ib.*

2. Generally.

1. What the parties in pleading have agreed and admitted must stand, in that action and as between them

for truth. *Executors of Schenck v. Schenck*, 276

2. If a defendant neglects to plead his discharge, under the insolvent act, in an action for a debt contracted previous to his discharge, and suffers the regular time for pleading the same to elapse under a mistaken idea of the law, the court will not permit him afterwards to withdraw a relicta given by him at the circuit in order to plead his discharge. *Executor of Ackerman v. VanHouten*, 332

III. Demurrer.

A demurrer admits all such facts as are sufficiently pleaded, but is no admission of such as are not sufficiently pleaded. *Coxe v. Gulick*, 328

FOLICY.

See CONTRACT.

POSTMASTER GENERAL.

See CONTRACT.

PRACTICE.

I. *Proceedings before trial.*

H. *Proceedings after trial.*

I. *Proceedings before trial.*

I. *Affidavit.*

II. *Notice and service of.*

III. *Rules and orders.*

IV. *Transcript.*

I. *Affidavit.*

1. The affidavit to shew that a witness lives out of the state, and thereby to obtain a commission for the examination of such witness need not be taken on notice. *Den v. Wood*, 62

2. An affidavit of the service of a declaration in ejectment which states that the copy was served "upon A. B. said to be one of the directors of the within named company" is in-

sufficient. *Den v. Copper Mining Company*, 237

2. *Notices and service of.*

1. Notice must be given of an application to discharge a defendant on common bail. *Geiger v. Morris*, 331

2. The notice subjoined to the declaration must be read or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service, and that it has been so done should be stated in the affidavit. *Den v. Fen*, 237

3. A notice to assess damages upon a judgment entered upon a sheriff's bond, is properly served upon the sheriff and his sureties and need not be served upon the attorney, who appeared for the defendants in the suit on the bond. *State v. Hamilton, et. al.*

4. Such notice may be given by an attorney selected by the parties interested in obtaining the assessment, though such attorney was not the one employed in obtaining the amercements on which the assessment is to be made, ib.

3. *Rules and orders and service of.*

1. A rule to take affidavits does not expire at the next term after it is taken, but stands until the cause is argued. *Rogers v. Chadwick*, 58

2. An order for the issuing a commission for the examination of a witness, stays the proceedings. *Den v. Wood, et. al.* 62

3. There must be an order of the court, to authorise the issuing of an attachment against a party for not obeying an award of arbitrators, which had been made a rule of court. *McDermot v. Butler*, 158

4. The Supreme Court will not order the defendant to give security for cots, upon the ground that but

one of the plaintiffs resides in this state, and that he had several years before the commencement of the suit taken the benefit of the insolvent law. *Den v. Boqua*, 192

5. In a transitory action, if the venue is not laid in the county where the cause of action arose, or where the defendant resides, the court will on motion, and without affidavit of defence, change the venue to the county where the defendant resides, if the plaintiff reside out of the state. *Worley and Welsh v. Scudder and Coryell*, 231

6. The court will not consolidate two actions brought against the same person, by the same plaintiffs upon promissory notes drawn at different dates and payable at different times, where it does not appear that the defence is the same in each, 241

7. In an attachment against an absent absconding debtor, where the defendant appears and puts in special bail, it is proper since the act of 39th May 1820, (*Rev. Laws* 734, sec. 3) that the rule dissolving the attachment, should contain a clause saving all liens created by the statute. *Anonymous*, 60.

8. The court have power in a proper case to set aside or strike out a plea. *North Brunswick v. Booraem*, 257.

9. That the attorney of the plaintiff has not authority to prosecute the suit, is not the proper subject matter of a plea. The proper method of taking advantage of such a fact is by motion to the court to stay proceedings, *ib.*

4. Transcript.

The transcript when once sealed and certified by the clerk need not in ordinary cases be altered in date or resealed, though the trial does not take place at the first circuit after the transcript is made out and certi-

fied : but the same certificate will answer for the trial of the cause at any future term. *Den v. Dunham and Rambo*, 150

II. Proceedings after trial.

I. Assessment of Damages.

II. Verdict.

III. Judgment.

IV. Costs.

V. Restitution.

1. Assessment of Damages.

1. In an action upon an administration bond, the judgment must be rendered for the penalty of the bond, and a court of law cannot assess damages upon it. *Ordinary v. Snook*, 65

2. Verdict.

1. If in an action of debt on bond, with a penalty to secure the payment of money only, the defendant pleads payment, and gives notice of set off, and any part of the debt has been paid, it is proper for the jury to specify by their verdict the exact balance due the plaintiff, although the judgment must be rendered for the penalty. *Administrators of Richman v. Richman*, 114

3. Judgment.

1. Though a writ of error has been brought and one of the errors assigned for the reversal of the judgment is the excess of the judgment over the sum demanded in the declaration, this court will allow the party in whose favour the judgment is, to amend the record, by entering a remittitur of the surplus, and a judgment for the amount mentioned in the declaration. *Herbert v. Hardenbergh*, 222

4. Costs.

1. A party cannot commence a

second action in the same court, for the same cause of action, until the costs of the first action are paid, and the rule is the same as to all courts within the same jurisdiction. *Swing, et. al. v. Alloways Creek*, 58

2. Upon the quashing an attachment for not obeying an award, the attorney of the defendant is entitled to the same costs as in other civil cases. *McDermot v. Butler*, 63

5. Restitution writ of.

1. Where money has been paid by the defendant, under a judgment which is subsequently reversed on a writ of error and it appears by the record that such payment was made, the court will order restitution. *Scott v. Conover*, 61

2. But where it does not appear by the record that the money has been paid, there the party must sue out a *scire facias quare restitutionem non*, ib.

3. A writ of restitution issued after, although tested before the death of the defendant, or person against whom it issues, will be quashed, and the application to quash may be made on behalf of the party interested. *Quigley v. Middleton*, 293

PRESUMPTION.

1. Proof of placing in the post office a letter containing a notice of trial, directed to the defendant's attorney residing in a post town in due season to be received, the legal period prior to the day of trial, will if made in the presence of the defendant's attorney, and until repelled, raise a presumption, and stand for proof of the service of notice. *McCourry v. Suydam*, 245

2. But this presumption may be repelled by the affidavit of the attorney to whom the notice was directed, stating that it was not received, ib.

PROMISE.

If a promise is conditional, before a recovery can be had upon it, the performance of the condition must be shewn. Per Ch. Jst. Ewing. *Ribble and Flommerfelt v. Jefferson*, 139

PROMISSORY NOTE.

In an action brought by the payee of an order or bill of exchange against the drawer, the state of demand must substantially aver that notice, in due season was given to the drawer, of the non acceptance or non payment of the bill or order. *Ribble v. Jefferson*, 139

PURCHASER.

A purchaser of lands at sheriff's sale, has not, previous to the making and delivery to him of the sheriff's deed, for said lands, such an interest therein as can be levied upon and sold by virtue of a *fi. facias de bonis et terris*. *Den v. Steelman*, 194

REMITTITUR.

Though a writ of error has been brought, and one of the errors assigned for the reversal of the judgment, is the excess of the judgment over the sum demanded in the declaration, this court will allow the party in whose favor the judgment is, to amend the record, by entering a remittitur of the surplus and a judgment for the amount mentioned in the declaration. *Herbert v. Hardenbergh*, 222

REPORT OF AUDITORS.

See ATTACHMENT.

RESTITUTION.

Where money has been paid by defendant under a judgment which is subsequently reversed on writ of error, if it appears by the record, that such payment was made, the court

will order restitution. *Scott v. Conover*, 61

But where it does not appear by the record that the money has been paid, there the party must sue out a *scire facias quare restitutionem non*, *ib.*

RETURN TO WRIT OF ERROR.

In making return to a writ of error, the schedule should contain simply a transcript of the record from the book of judgments. *M'Courry v. Doremus and Suydam*, 245

REVERSAL OF JUDGMENT.

See COURT OF COMMON PLEAS.

APPEAL.

SUPREME COURT.

SALE.

See COMMISSIONERS.

SHERIFF.

SCIRE FACIAS.

A *scire facias* against a garnishee in attachment, is defective, if it does not state with precision and certainty the nature of the property attached. The words "rights and credits," do not sufficiently specify the nature of the property; and an inventory returned with a writ of attachment would be defective, if it did not state with more certainty and precision, what was the nature of the property attached. *Neal v. Cook*, 337

When a judgment has been reversed on writ of error, and it does not appear by the record that the money has been paid, there the party (to recover it back) must sue out a *scire facias quare restitutionem non*. *Scott v. Conover*, 61

SECURITY FOR COSTS.

See COSTS.

SHERIFF.

I. Bond of.

II. Deed of.

I. Bond of.

A notice to assess damages, upon a judgment entered upon a sheriff's bond, is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for the defendants in the suit on the bond. *State v. Edsall*, 190

It is not necessary to assign breaches on the record, after a judgment by default on a sheriff's bond, *ib.*

II. Deed of.

A purchaser of lands, at sheriff's sale, has not, previous to the making and delivering to him of the sheriff's deed, for said lands, such an interest therein as can be levied upon and sold by virtue of *fieri facias de bonis et terris*. *Den v. Steelman*, 193

A sheriff's deed takes full effect only from the time of delivering, and does not relate back to the time of sale, so as to sustain an intermediate sale and conveyance by the sheriff, of the lands therein mentioned, *ib.*

STATE OF DEMAND.

1 The time when services were rendered, for which the plaintiff claims compensation should be alleged in the state of demand, and if no time is stated the judgment will be reversed. *Vanguilder v. Stull*, 233

2. If on the debit side of the account, there is a general charge for sundries, making the plaintiff's demand exceed the sum of one hundred dollars; yet if on the credit side of the account there is a general credit given the defendant for the same sum in the same language, and of the same date, which reduces the balance of plaintiff's demand under \$100, the justice has jurisdiction of the cause. *Cornelius v. Ivins*, 58

3. In an action brought by a firm it is necessary to set out in the state

of demand and proceedings, the christian names of the individuals composing the partnership, or the judgment will be reversed. *Tomlinson v. Burk & Clark*, 295

the judgment will be reversed. *Bowen v. Mulford*, 230

VARIANCE BETWEEN SUMMONS AND DECLARATION.

See ABATEMENT.

STATUTES, CONSTRUCTION OF.

1. The statute of November 1820, *Rev. Laws* 796, which gives the Court of Common Pleas power to grant relief, on appeal, both in matters of laws and matters of fact, means such relief as accords with the nature of another trial, not such as belongs peculiarly to a writ of error. The jurisdiction of the Supreme Court on *certiorari*, was not by that statute transferred to the Court of Common Pleas, nor are the same grounds of reversal to be applied or prevail in the one court as in the other. *Martin v. Thompson*, 142

2. The statute of New-Jersey, of 13th June 1799, abolishing all English statutes, did not abolish estates tail. *Per Ford Justice. Den v. Smith & Fox*, 39

3. The statute of N. J. (*Revised Laws* 556) which enacts "that no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate, that it is the intention of the parties to create an estate in joint tenancy, and not an estate in common," does not apply to an estate granted to husband and wife. *Den v. Hardenbergh*, 42

SUMMONS.

If the summons is issued in the name of J. M. plaintiff, and in the state of demand a middle letter is inserted, in the name of the plaintiff (*viz*, J. S. M.) and the defendant does not appear, but judgment is rendered against him in his absence,

SUPREME COURT.

This court will not reverse the judgment of a justice on account of an omission to charge the jury upon a specific proposition, stated by the counsel, unless it be made clearly to appear, that the proposition was warranted, by the evidence, and necessarily involved in the verdict to be returned. *Davison v. Schooley*, 145

The jurisdiction of the Supreme Court on *certiorari*, was not by the statute of November 1820, (*Rev. Laws* 796,) transferred to the Court of Common Pleas, nor are the same grounds of reversal to be applied or prevail in the one court as in the other. *Martin v. Thompson et al.* 142

SURVEYORS.

In order to prove the oaths of office of the surveyors, it is not necessary to produce the original oaths which are filed with the clerk of the township; it is sufficient to produce copies proved to be true copies. *State v. Hutchinson*, 242

TIME.

The time when services were rendered, for which the plaintiff claims compensation, should be alleged in the state of demand. *Vanguilder v. Stull*, 233

See. STATUTE OF LIMITATIONS.

TRANSCRIPT.

1. The transcript when once sealed and certified by the clerk, need not in ordinary cases be altered in date or re-sealed, though the trial does not take place at the first cir-

cnit after the transcript is made out and certified; but the same certificate will answer for the trial of the cause at any future time. *Den v. Rambo*, 150

2. If it appears by the transcript of the justice that he took time to advise, and it does not appear that the defendant attended at the time the judgment was rendered, the Court of Common Pleas may dismiss the appeal. *Vandoren v. Vandoren*, 286

TRANSITORY ACTION.

See VENUE.

TRESPASS.

1. In order to prove that the cause of action of a former suit in trespass, was the same as that for which a subsequent suit of trespass on the case was brought, it is necessary to produce not only the transcript, but the state of demand also; and until this is done parol evidence of the identity of the subject matter of both suits cannot be received. *Davison v. Gardner*, 289

2. In an action of trespass brought by A. and B. against C. for taking out of their possession a quantity of ship plank, sold to them by D., C. cannot give in evidence a judgment against D. (with the execution thereon) entered by confession under the statute, (*Rev. Laws 634, Sec. 18.*) in an action instituted before a justice of the peace without process, and without such an affidavit as is required by the act. *Sheppard v. Sheppard*, 250

3. An item in plaintiff's state of demand, or copy of his account, charging defendant "to loading vessel at his wharf, at Cedar Bush Landing" may be considered as a charge for wharfage and not a trespass, 56

must prove property in the article for which the action is brought. *Debow v. Titus*, 128

VENUE.

In a transitory action, if the venue is not laid in the county, where the cause of action arose, or where the defendant resides, the court will on motion, and without affidavit of defence change the venue to the county where the defendant resides, if the plaintiff resides out of state. *Walsh v. Scudder*, 231

VERDICT.

1. This court will set aside a verdict, and grant a new trial, if in their opinion, the verdict is against the weight of evidence, or if justice has not been done. *Hutchinson v. Coleman*, 74

2. If in an action of debt on a bond, with a penalty to secure the payment of money only, the defendant pleads payment, and gives notice of set off, and any part of the debt has been paid, it is proper for the jury to specify by their verdict the exact balance due the plaintiff, although the judgment must be rendered for the penalty. *Richman v. Richman*, 114

WARRANTY.

If the vendor of lands in fee covenants, for himself and his heirs, that he will warrant and defend the land to the vendee, his heirs and assigns, an assignee of the vendee who is evicted, may maintain a personal action of covenant against the executors of the vendor; and it is not necessary to maintain the action, to aver that notice of the pendency of the suit, by which the plaintiff was evicted, was given to the defendant. *Chapman v. Holmes*, 20

WIDOW.

See COMMISSIONERS.
DOWER.

TROVER.

To maintain trover, the plaintiff

WITNESS.

1. A interest in the question in controversy, does not disqualify a person from being a witness; the interest which excluded a witness is an interest in the event of the suit.

Henrie v. Maxwell,

297

2. If A. brings an action against B. for the amount of a due bill, given by B. to A. and B. pleads payment and gives notice of his intention to prove on the trial, that C. in his life time agreed to pay, and

did pay A. the amount of the due bill, and offers D. the executor and residuary legatee of C. to prove the fact of payment, C. is a competent witness for that purpose, *ib.*

3. If the subscribing witness to an instrument resides out of the reach of the process of the court, his hand writing may be proved.

Den v. Van Houten,

270

WRIT OF ERROR.

See ERROR.

ERRATA.

Page 1, line 22, *after continuance, insert :*

Ibid. after expired, strike out .

3, line 8, *for purchases, read purchase.*

14, line 39, *for of read or.*

17, line 17, *for was read were.*

29, line 21, *for covenants read covenantor.*

39, line 6, *for to read of.*

44, line 8, *for 2 read section of.*

14, *for is read in.*

45, line 24, *after make strike out as.*

53, line 19, *after affirmation strikes out limited.*

after time insert limited.

56, line 5, *for and read but.*

62, line 15, *for or read nor.*

18, *for and read but.*

91, line 30, *for best read least:*

104, line 23, *for is read as.*

115, line 23, *for bond read issue.*

121, line 30, *for in read is.*

126, line 14, *after propriety insert of.*

129, line 36, *for This is read Thus.*

139, line 23, *instead of clerks read clerk.*

after clerk insert so:

147, line 11, *for acted read cited.*

151, line 2, *after Prius strike out which.*

154, line 28, *for action read return.*

193, line 19, *strike out and D. Elmer.*

204, line 38, *for principal read penal.*

211, line 27, *for could read will.*

250, line 39, *for L. Q. C. Elmer read Wall and Armstrong.*

264, line 21, *for purchase read purchased.*

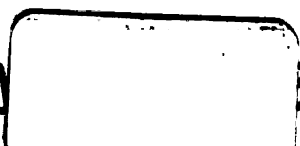
331, line 29, *for court read count.*

333, line 2, *for allowed read obtained.*

2438 133



LIBRARY



LIBRARY

Digitized by Google

